Chu Kim Sing & Anor v Abdul Razak bin Amin

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12–36 OF 1996
ABDUL MALIK ISHAK J
10 AUGUST 1999

Damages (Personal Injury or Death) *— Personal injuries — Leg fracture — Closed fracture of midshaft of left femur — Quantum*

Damages (Personal Injury or Death) *— Personal injuries — Multiple scars of right lower limb — Movement would be restricted due to muscle scarring — Pain — Quantum*

Damages (Personal Injury or Death) *— Personal injuries — Shoulder — Acromio-clavicular dislocation — Quantum — Whether injury sustained in accident*

Tort *— Negligence — Road accident — Contributory negligence — No valid driving licence — Respondent not wearing safety helmet — Respondent's motorcycle has no road tax, insurance and not fitted with horn — Appellant found to be 100% liable for accident — Whether respondent contributed to accident — Appellant pleaded guilty to charge of careless and inconsiderate driving — Whether appellant be barred from raising defence of contributory negligence — Whether respondent entitled to full compensation*

The appellant and the respondent were involved in a road accident. The respondent was riding a motorcycle along a major road. The appellant was driving a motorcar along a minor road. The appellant did not slow down when approaching the junction and did not stop at the halt line. Instead, he went straight ahead to the main road and collided into the respondent. The appellant had pleaded guilty to a charge of careless and inconsiderate driving and had been sentenced. At the conclusion of the hearing before the trial court, the appellant was found 100% liable for the accident. The respondent was granted the following damages: (i) RM8,000 for acromio-clavicular dislocation; (ii) RM25,000 for a closed fracture of the midshaft of the left femur; (iii) RM5,000 for the scars; and (iv) loss of earnings. The appellant appealed against the whole of the decision of the trial court. It was argued that the respondent was contributorily negligent based on the fact that: (i) the respondent did not have a valid driving licence; (ii) the respondent was not wearing a safety helmet; (iii) the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn; and (iv) the respondent did not take an evasive action. On the damages awarded to the respondent, it was argued, inter alia, that the acromio-clavicular dislocation was not caused by the accident because it was not stated in the initial medical report. Further, the injury was not particularized in the statement of claim. It was also submitted that the respondent should only be awarded RM4,000 for the acromio-clavicular dislocation based on two Singaporean cases. The issues before the court were: (i) whether the respondent was contributorily negligent; and (ii) what was the proper quantum of damages to be awarded to the respondent.

Held, dismissing the appeal:

(1) The fact that the respondent did not have a valid driving licence and was not wearing a safety helmet and the fact that the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn could not in law make him negligent. There was no duty on the part of the respondent to minimise the effects or probable consequences of any injury that he may suffer, but he has yet to suffer, through the negligence of another. It was not foreseeable for the respondent to foresee that harm would fall on others as to make him liable for actionable negligence by riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle while those extraneous factors were contravened by him would result in harm to himself and thereby contributing to the cause of the accident (see p 446B–D).

(2) The respondent had taken all proper steps to stop his motorcycle and the respondent too had tried to swerve to the right a little. The respondent took reasonable care of himself when he rode the motorcycle. He was not part author of his own injury and he was thus entitled to be compensated in full by the appellants. Further, the respondent was not specifically challenged in regard to the evasive action taken by him while riding the motorcycle. It is now trite law that what is not challenged or disputed is deemed to have been admitted (see pp 446E–F, 446I–447A).

(3) The appellant pleaded guilty to a charge of careless and inconsiderate driving under s 43(1) of the Road Transport Act 1987 and this piece of evidence would be admissible evidence for the court to consider. Having pleaded guilty, the appellant must now be barred from raising the defence of contributory negligence (see pp 464A, 466A).

(4) All the facts point conclusively to the negligence of the appellant and liability of the appellant was on the basis of 100%. The respondent did not contribute to the accident at all. From the available evidence, the appellant failed to discharge the burden of proving contributory negligence on the part of the respondent (see pp 453B, 463E).

(5) Although the initial medical report did not mention the acromio-clavicular dislocation, there was ample evidence to show that the respondent had suffered this injury and that the injury was caused by the motor vehicle accident. The respondent had proved on the balance of probabilities that he had indeed sustained the injury in the motor vehicle accident (see pp 468B, 469C).

(6) The object of pleadings would simply be to alert the other party of the case which he has to meet and to prevent surprise. On this score, it could hardly be said that the appellant were caught by surprise in respect of the acromio-clavicular dislocation. From day one, the appellant knew of the respondent's claim under this head. The appellant was not misled, prejudiced, embarrassed or in any way caught by surprise or being led astray by the respondent's pleadings from the very beginning. Further, the appellant did not raise any objection at the trial proper in regard to the injury under this head nor did the appellants raise an objection in regard to this issue in the memorandum of appeal. The appellant should confine himself to the memorandum of appeal in arguing the present appeal before the court (see pp 469E–F, 471G, 469H, 470A).

(7) Although the respondent did not file a cross-appeal in regard to the quantum, the court has a discretion to vary the award. Further, the court take judicial notice of the exchange rate of Malaysian ringgit to that of Singapore dollar. Being a severe injury, the court increased the quantum for the acromio-clavicular dislocation from RM8,000 as awarded by the trial court to RM20,000 in view of our weak ringgit as compared to the Singapore dollar (see pp 477F–G, 480C–D, 474B–C).

(8) The sum of RM25,000 for the closed fracture of the midshaft of the left femur was not generous nor was it manifestly excessive. In fact, the award was too low bearing in mind that the court must keep up with the times. A more realistic figure and in attempting to keep up with the times, the award for closed communited fracture of the midshaft of the left femur with wasting of the muscles must be varied from RM25,000 to RM35,0000 (see p 477F–G).

(9) The latest decision for multiple scars of the right lower limb was an award for S$7,000. Applying the exchange rate, the award in the present case should be RM15,800. This amount would be reasonable and fair for the scars sustained by the respondent, according to the medical report, pain would be felt and movement would be restricted due to the muscle scarring (see pp 478H–479A).

(10) In assessing damages for loss of earnings, a deduction for living expenses of the respondent should be made. The court awarded RM11,220 for actual loss of earnings applying the multiplier 11 as stated in the statement of claim (see pp 482H, 485A). The respondent was also awarded pre-trial partial loss of earnings of RM2,400 in line with the statement of calim. The court also varied the award of the trial court for future loss of earnings from RM28,200 to the sum of RM90,720 taken into account

the age of the respondent at the time he was injured and the multiplier as sets out in s 28A(2)(d)(ii) of the Civil Law Act 1956 (see pp 486E–G, 485D).

[Bahasa Malaysia summary

Perayu dan responden telah terlibat di dalam kemalangan jalan raya. Responden menunggang motosikal di sepanjang jalan utama. Perayu memandu motokar di jalan yang kecil. Perayu tidak memperlahankan keretanya apabila menuju ke simpang dan tidak berhenti di garisan henti. Sebaliknya, beliau menuju terus ke jalan utama dan berlanggar dengan responden. Perayu telah mengaku bersalah untuk pertuduhan memandu secara cuai dan tidak bertimbang rasa dan telah dijatuhkan hukuman. Di akhir perbicaraan di hadapan mahkamah perbicaraan, perayu didapati 100% bertanggungan untuk kemalangan tersebut. Responden telah diberikan ganti rugi berikut: (i) RM8,000 untuk seliuh acromio-clavicular; (ii) RM25,000 untuk fraktur tertutup bahagian tengah femur kiri; (iii) RM5,000 untuk parut-parut; dan (iv) kehilangan pendapatan. Perayu telah merayu terhadap keseluruhan keputusan mahkamah perbicaraan. Adalah dihujahkan bahawa responden telah melakukan kecuaian sertaan berdasarkan fakta bahawa; (i) responden tidak mempunyai lesen memandu yang sah; (ii) responden tidak memakai topi keselamatan; (iii) motosikal yang ditunggangnya adalah tanpa cukai jalan, insurans dan tidak dipasang dengan hon; dan (iv) responden tidak mengambil tindakan mengelak. Berkenaan dengan ganti rugi yang diawardkan kepada responden, adalah dihujahkan, antara lain, bahawa seliuh acromio-clavicular tersebut tidak diakibatkan oleh kemalangan tersebut kerana ia tidak dinyatakan di dalam laporan perubatan awal. Selanjutnya, kecederaan tersebut tidak dibutirkan di dalam pernyataan tuntutan. Adalah juga dihujahkan bahawa repsonden hanya patut diawardkan RM4,000 untuk seliuh acromio-clavicular berdasarkan dua kes Singapura. Isu-isu di hadapan mahkamah adalah; (i) sama ada responden telah melakukan kecuaian sertaan; dan (ii) apakah kuantum kerugian yang wajar diawardkan kepada responden.

Diputuskan, menolak rayuan tersebut:

(1) Fakta bahawa responden tidak memiliki suatu lesen memandu yang sah dan tidak memakai topi keselamatan dan fakta bahawa motosikal yang ditunggangnya adalah tanpa cukai jalan, insurans dan tidak dipasang dengan hon tidak boleh menjadikanya sebagai cuai. Tiada tugas di pihak repsonden untuk meminimakan kesan-kesan dan juga akibat-akibat yang mungkin atas sebarang kecederaan yang mungkin dialaminya, yang beliau belum mengalami lagi, dengan kecuaian orang lain. Adalah tidak boleh dijangkakan untuk responden menjangka

bahawa bahaya akan menimpa orang lain yang mungkin menyebabkannya bertanggungan untuk perbuatan cuai boleh dakwa dengan menunggang motosikal apabila faktor-faktor luaran dilanggar olehnya dan responden juga tidak menjangka bahawa dengan menunggang motosikal tersebut semasa faktor-faktor luaran itu dilanggar olehnya akan mengakibatkan bahaya kepada dirinya sendiri dan dengan itu menyumbang kepada punca kemalangan tersebut (lihat ms 446B–D).

(2) Responden telah mengambil semua langkah-langkah untuk menghentikan motosikalnya dan responden juga telah cuba untuk membelok ke kanan sedikit. Responden telah menjaga dirinya secara munasabah semasa menunggang motosikal tersebut. Adalah sesuatu yang jelas di sisi undang-undang bahawa apa yang tidak dicabar atau dipertikaikan adalah dianggap sebagai diterima (lihat ms 446E–F, 446I–447A).

(3) Perayu telah mengaku bersalah untuk tuduhan memandu dengan cuai dan tidak bertimbang rasa di bawah s 43(1) Akta Pengangkutan Jalan 1987 dan keterangan ini adalah keterangan yang boleh diterima masuk untuk mahkamah pertimbangkan. Selepas mengaku bersalah, perayu mesti dihalang daripada membangkitkan pembelaan kecuaian sertaan (lihat ms 464A, 466A).

(4) Semua fakta-fakta menunjukkan secara konklusif akan kecuaian perayu dan perayu adalah 100% bertanggungan. Responden tidak menyumbang kepada kemalangan itu langsung. Daripada keterangan yang ada, perayu telah gagal untuk melepaskan beban untuk membuktikan kecuaian sertaan di pihak responden (lihat ms 453B, 463E).

(5) Walaupun laporan perubatan yang asal tidak menyatakan seliuh acromio-clavicular, terdapat banyak keterangan untuk menunjukkan bahawa responden telah mengalami keceederaan ini dan kecederaan tersebut adalah diakibatkan oleh kemalangan motokar tersebut. Responden telah membuktikan di atas imbangan kebarangkalian bahawa beliau benar-benar mengalami kecederaan tersebut di dalam kemalangan motokar tersebut (lihat ms 468B, 469C).

(6) Tujuan pliding dengan mudahnya adalah untuk memberitahu pihak yang lain kes di mana beliau terpaksa menjawab dan untuk mengelak kejutan. Atas premis ini, adalah sukar untuk dikatakan bahawa perayu telah menerima suatu kejutan berkenaan dengan acromio-clavicular. Dari hari pertama, perayu tahu tuntutan responden di bawah tajuk ini. Perayu tidak diperdaya, diprejudiskan, dimalukan atau dalam apa cara sekali pun menerima kejutan atau dipesongkan oleh pliding responden dari mula lagi. Selanjutnya, perayu tidak membangkitkan sebarang bantahan semasa perbicaraan

sebenar berkenaan dengan kecederaan di bawah tajuk ini dan perayu tidak juga membangkitkan sebarang bantahan berkenaan isu ini di dalam memorandum rayuan. Perayu patut menghadkan diri kepada memorandum rayuan di dalam menghujahkan rayuan ini di hadapan mahkamah (lihat ms 469E–F, 471G, 469H, 470A). A B

(7) Walaupun responden tidak memfailkan rayuan-balas berkenaan dengan kuantum, mahkamah mempunyai budi bicara untuk mengubah award tersebut. Selanjutnya, mahkamah telah prihatin secara kehakiman mengenai kadar pertukaran Ringgit Malaysia dengan dolar Singapura. Oleh kerana kecederaan adalah teruk, mahkamah telah meninggikan kuantum untuk seliuh acromio-clavicular daripada RM8,000 seperti yang diawardkan oleh mahkamah perbicaraan kepada RM20,000 memandangkan ringgit yang lemah berbanding dengan dolar Singapura (lihat ms 477F–G, 480C–D, 474B–C). C D

(8) Jumlah RM25,000 untuk fraktur tertutup bahagian tengah femur kiri bukanlah tinggi atau terlalu melampau. Hakikatnya, award adalah terlalu rendah dan dengan mengambil kira bahawa mahkamah mestilah mengikut peredaran masa, award untuk fraktur tertutup bahagian tengah femur kiri dengan hilang penggunaan otot-otot mestilah diubah daripada RM25,000 kepada RM35,000 (lihat ms 477F–G). E

(9) Keputusan terkini untuk parut-parut yang pelbagai di kaki kanan adalah award sebanyak S$7,000. Dengan memakai kadar pertukaran tersebut, award di dalam kes ini sepatutnya adalah RM15,800. Jumlah ini adalah munasabah dan adil untuk parut-parut yang dialami oleh responden, yang menurut laporan perubatan, kesakitan boleh dirasai dan pergerakan akan dihadkan oleh kerana parut di otot (lihat ms 478H–479A). F

(10) Di dalam menaksir ganti rugi untuk kehilangan pendapatan, suatu potongan untuk perbelanjaan hidup responden patutlah dibuat. Mahkamah telah mengaward RM11,220 untuk kerugian pendapatan yang sebenar dengan memakai pengganda 11 seperti yang dinyatakan di dalam pernyataan tuntutan (lihat ms 482H, 485A). Responden juga diawardkan kerugian sebahagian pendapatan pra-perbicaraan sebanyak RM2,400 selaras dengan pernyataan tuntutan. Mahkamah juga telah mengubah award mahkamah perbicaraan untuk kerugian pendapatan di masa hadapan daripada RM28,200 kepada jumlah RM90,720 dengan mengambil kira usia responden pada masa beliau dicederakan dan juga pengganda yang dibentangkan di dalam s 28A(2)(d)(ii) Akta Undang-Undang Sivil 1956 (lihat ms 486E–G, 485D).] G H I

A **Notes**

For cases on personal injuries, see 6 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 389–689.

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 621–826.

B

Cases referred to

Ahmad Nordin bin Hj Maslan & Anor v Eng Ngak Hua & Ors [1985] 2 MLJ 431 (refd)

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770 (refd)

C

Algie v DH Brown & Son Ltd [1931] NZLR 520 (refd)

Ang Lit Yiang & Ors v Teoh Hing Yeu & Anor [1996] 3 MLJ 277 (refd)

Angell v HH Bushell & Co Ltd [1968] 1 QB 813 (refd)

Balakrishnan v Savastine Anthony & Anor 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1199 (refd)

D

Baldwin & Francis Ltd v Patents Appeal Tribunal [1959] AC 663 (refd)

Berrill v Road Haulage Executive [1952] 2 Lloyd's Rep 490 (refd)

Blyth v Birmingham Waterworks Co (1856) 11 Exch 781 (refd)

Canning v R [1924] NZLR 118, [1923] GLR 595 (refd)

Cassels v Thompson [1930] 3 DLR 65 (refd)

E

Caswell v Powell Duffryn Associated Collieries Ltd [1940] AC 152 (refd)

Chang Chong Foo & Anor v Shivanathan [1992] 2 MLJ 473 (refd)

Chellappan Chivadasan v Wee Poh Construction Co (Pte) Ltd 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1397 (refd)

Chock Kek Ling v Patt Hup Transport Co Ltd & Ors [1966] 1 MLJ 120 (refd)

F

Chow Kay Kong v Ching Tong & Ors [1967] 2 MLJ 31 (refd)

Coleman v Hogg [1931] NZLR 513, GLR 185 (refd)

Delaney v Sweeney [1940] SASR 244 (refd)

Dominion Airlines Ltd v Strand [1933] NZLR 1, GLR 22 (refd)

Donoghue v Stevenson [1932] AC 562 (refd)

Drummond-Jackson v BMA [1970] 1 WLR 688 (refd)

G

Duncan v Wakeford [1941] NZLR 25 (refd)

Edwards v Weeks [1930] VLR 225 (refd)

Fardon v Harcourt-Rivington (1932) 146 LT 391 (refd)

Forby v Laucke [1933] SASR 60 (refd)

FT Wimble & Co Ltd v Guilleser [1928] St R Qd 20 (refd)

H

Govinda Raju & Anor v Laws [1966] 1 MLJ 188 (refd)

Graves v Walcom [1926] SASR 34 (refd)

Groves v Wimborne [1898] 2 QB 402 (refd)

Henwood v Municipal Tramways Trust (1938) 60 CLR 438 (refd)

Hopewell v Baranyay [1962] VR 311 (refd)

Hussein & Anor v Maiden [1970] 1 MLJ 114 (refd)

I

Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors [1995] 2 MLJ 646 (refd)

Ingram v Percival [1969] 1 QB 548, [1968] 3 All ER 657 (refd)

Ismail bin Haji Manap & Anor v Onn Swee Imm 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1309 (refd)
Kek Kee Leng v Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 (refd)
Kent v Stamps [1982] RTR 273 (refd)
KR Taxi Service Ltd & Anor v Zaharah & Ors [1969] 1 MLJ 49 (refd)
Lee Eng Beng & Anor v Torairajah & Ors [1987] 1 MLJ 121(refd)
Lee Wee Yee & Anor v Koh Geok Chee & Ors 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1188 (refd)
Lee Yew Hoe v Lee Bock Huat [1980] 2 MLJ 271 (refd)
Lee You Suen v Liew Lok & Ors [1967] 2 MLJ 60 (refd)
Lewis v Denye [1939] 1 KB 540 (refd)
Lim Ah Toh v Ang Yau Chee & Anor [1969] 2 MLJ 194 (refd)
Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286 (refd)
London Passenger Transport Board v Upson [1949] 1 All ER 60 (refd)
Low Chee Siang & Anor v Wong Chong Pow & Anor 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1301 (refd)
Low You Choy & Anor v Chan Mun Kit & Anor 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1125 (refd)
Mahmod bin Kailan v Goh Seng Choon & Anor [1976] 2 MLJ 239 (refd)
Mariyayee & Anor v Nadarajan [1975] 2 MLJ 267 (refd)
Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd [1982] 2 MLJ 71 (refd)
Mathavan a/l Shunmugam v Woo Bee Leng [1995] 1 MLJ 841 (refd)
McAsey v Lobban [1938] VLR 140 (refd)
Mohamed Repin v Lim Yu Kee [1969] 1 MLJ 64 (refd)
Mount Cook Group v Johnstone Motors Ltd [1990] 2 NZLR 488 (refd)
Muffitt v Fleming [1938] OR 358 (refd)
Murugan v Lew Chu Cheong [1980] 2 MLJ 139 (refd)
Nance v British Columbia Electric Railway Co Ltd [1951] AC 601 (refd)
Ng Aik Kian & Anor v Sia Loh Sia [1997] 2 AMR 1996 (refd)
Noor Mohamed v Palanivelu & Anor [1956] MLJ 114 (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324 (refd)
Ong Sim Moy & Ors v Ong Sim Hoe [1969] 1 MLJ 82 (refd)
Paul v DPP (1990) 90 Cr App Rep 173 (refd)
Phillips v Britannia Hygienic Laundry [1923] 2 KB 832, (1923) 93 LJ KB 5, 129 LT 777, 39 TLR 530 (refd)
Phuah Jee Suan v Nila Vasu Pillai [1973] 1 MLJ 186 (refd)
Reynolds v Llanelly Associated Tinplate Co Ltd (Court of Appeal) [1948] 1 All ER 140 (refd)
RJ McGuinness v Ahmad Zaini [1980] 2 MLJ 304 (refd)
Robertson v Carmody [1870] 1 VLR 6 (refd)
Rosita bte Baharom & Anor v Sabedin bin Salleh [1992] 1 MLJ 379 (refd)
Seow Gek Soo @ Yeo Gek Soo the administratrix of the Estate of Ee Pinn Ian, deceased v Chia Mun Fook [1989] 1 CLJ 985 (refd)
Siow Choo Foo v Lee Peng Lay & Anor [1981] 2 MLJ 336 (refd)
Siti Aisha Binti Ibrahim v Goh Cheng Hwai [1982] 2 MLJ 124 (refd)
Swadling v Cooper [1931] AC 1 (refd)

Tan Ah Hoong v Mahalingam [1962] MLJ 250 (refd)
Tan See Teng v Lim Kwee Hwee 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1136 (refd)
Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50 (refd)
Thangavelu s/o Chinnasamy v Chia Kok Bin [1981] 2 MLJ 277 (refd)
Thevannasan & Anor v Pang Cheong Yow & Ors [1973] 1 MLJ 254 (refd)
Topaiwah v Salleh [1968] 1 MLJ 284 (refd)
Tucker v McCann [1948] VLR 222 (refd)
Turner v MGM Pictures Ltd [1950] 2 All ER 449 (refd)
Ungku Abdul Jalil bin Abdullah v Alexander Philip Kamanthra 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1390 (refd)
United Plywood and Sawmill Ltd v Lock Ngan Loi [1970] 2 MLJ 237 FC (refd)
Victor Alphonse Sebastian & Ors v Lee Ah Leek 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1056 (refd)
Wimble & Co Ltd v Guilleser [1928] St R Qd 20 (refd)
Wong Ah Gan v Chan Swei Yueh & Anor [1970] 2 MLJ 25 (refd)
Wong Tin Vui v Patrick Midok & Anor [1975] 2 MLJ 260 (refd)
Woods v Davison [1930] NI 161 (refd)
Yap Yew Yee v Subramaniam & Anor [1972] 2 MLJ 53 (refd)
Yeoh Cheng Han v Official Administrator, Malaya [1972] 2 MLJ 7 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 68(1)(a), 73
Highway Code 1959 [LN 165/1959] r 18
Road Transport Act 1987 s 43(1)
Rules of the Court of Appeal 1994 r 13
Rules of the High Court 1980 O 42 r 12

Ong Chee Yong (*Ong & Ong*) for the appellants.
S Gunasegaran (*John Ang & Jega*) for the respondent.

Cur Adv Vult

Abdul Malik Ishak J:

Introduction

This was an appeal by the appellants against the whole of the decision handed down by the sessions court of Johor Bahru ('the trial court') on 4 July 1996 in a running down action. In that action, the respondent had claimed damages from the appellants for the personal injuries, losses and expenses suffered by him in a motor vehicle accident on 27 April 1992 caused, so said the respondent in his statement of claim, by the negligence of the appellants. At the conclusion of the hearing before the trial court, the appellants were found 100% liable for the road accident and the respondent

was awarded the appropriate general and special damages thereto. The appellants through Mr Ong Chee Yong argued, with zest and gusto, to the effect that the trial court had erred on both liability and quantum. Mr S Gunasegaran, in his usual style, argued for the respondent and raised several salient points by way of a rebuttal.

The undisputed facts

The following facts were not disputed by the parties and they can clearly be gleaned from the appeal record ('AR')

(1) That the motor vehicle accident happened on 27 April 1992 at about 12.30pm at the junction of Jalan Sultan Abu Bakar and Jalan Sultan Ibrahim.

(2) At the material time the respondent was riding a motorcycle JBS 7140 along Jalan Sultan Abu Bakar from left to right relative to the sketch plan at p 156 of AR whilst the first appellant was driving motorcar JEW 107 as servant and/or agent of the second appellant along Jalan Sultan Ibrahim from top to bottom relative to the sketch plan.

(3) That Jalan Sultan Abu Bakar is the main road whilst Jalan Sultan Ibrahim is the minor road as evidenced by the 'Stop' signboard in the sketch plan and the admission of the first appellant himself.

(4) That the first appellant failed to see or did not see the 'Stop' signboard (at p 117C of AR) and not only that the first appellant too:

  (i) did not stop at the halt line;

  (ii) did not slow down when approaching the junction (at p 117B of AR) but instead proceeded straight ahead to the main road and collided into the respondent who was, at the material time, lawfully travelling and riding the motorcycle JBS 7140 along the main road;

  (iii) did not see the respondent until he was very close, about 10 feet to 15 feet away and only then he applied the brakes (at p 117E–F of AR); and

  (iv) did not see the respondent riding the motorcycle in time to avoid the accident (at p 117C to D of AR).

(5) The first appellant was charged with the offence of careless and inconsiderate driving under s 43(1) of the Road Transport Act 1987 at the Kota Tinggi Magistrate's Court and the first appellant unhesitantly pleaded guilty and was fined RM400 and his driving licence was also duly endorsed (at p 118E–F and at pp 145 to 148 of AR).

The first appellant conceded before the trial court that he was wholly negligent and so the issues were drastically reduced and focussed on the following questions:

(1) Whether the respondent was contributorily negligent?

(2) What was the proper quantum of damages to be awarded to the respondent?

Grounds of appeal

The memorandum of appeal in pp 1 to 3 of AR set out nine grounds of appeal. Only ground number 1 focussed on the issue of liability while the rest of the grounds were entirely on the issue of quantum. I will now endeavour, to the best of my ability, to set out the arguments of the parties based on the grounds of appeal as seen in the memorandum of appeal.

Mr Ong Chee Yong, learned counsel for the appellants, argued that the trial court had erred in finding the first appellant 100% liable for the motor vehicle accident and he vigorously canvassed that the trial court failed to take into account the following salient facts into consideration:

(a) that the respondent was not entitled nor competent to ride a motorcycle on the road because at the material time he had no driving licence nor was he wearing a crash helmet;

(b) that the respondent did not slow down;

(c) that the respondent did not take an evasive action;

(d) that the respondent had failed to keep a proper look out; and

(e) that the respondent had ridden the motorcycle without a horn, a road tax and an insurance.

All these salient facts were somehow connected to one another and so I would consider them together in one go.

Mr S Gunasegaran, learned counsel for the respondent, submitted quite rightly that it was not disputed that at the time of the motor vehicle accident the respondent:

(i) did not have a valid driving licence;

(ii) was not wearing a safety helmet; and

(iii) the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn.

and clearly the respondent had breached certain provisions of the Road Transport Act 1987 and certainly, he may be prosecuted thereunder by the Public Prosecutor. These contraventions of the provisions of the Road Traffic Act 1987 were extraneous factors to the main issue of negligence upon which the respondent's claim against the appellants was founded and this court should not be concerned with these extraneous factors, so submitted by Mr S Gunasegaran. Mr Ong Chee Yong on the other end of the scale argued that these extraneous factors showed that the respondent could not, in the circumstances, take care of his own safety. The pertinent question to pose would be this:

Would these extraneous factors bar the respondent from claiming for damages from the appellants for the personal injuries, losses and expenses sustained and incurred by the respondent as a result of that motor vehicle accident?

To argue that these extraneous factors would show the contributory negligence of the respondent was, to say the least, plainly untenable. It has been said that where a statute creates a duty which is to be performed or observed by any person, it also creates a right vested in the persons for whose benefit the statute has been passed to have that duty performed or observed (*Groves v Wimborne* [1898] 2 QB 402; 67 LJ QB 862, 79 LT 284, 14 TLR 493). A person who drives a car in the city cannot say that he does not know the traffic regulations (*McAsey v Lobban* [1938] VLR 140). Thus, it can be said that when a collision occurs with a vehicle which is being driven in breach of the regulations, that breach is said to be prima facie evidence of negligence (*Canning v R* [1924] NZLR 118, [1923] GLR 595; *Graves v Walcon* [1926] SASR 34; *Coleman v Hogg* [1931] NZLR 513, GLR 185; *Dominion Air Lines Ltd v Strand* [1933] NZLR 1, GLR 22; *Henwood v Municipal Tramways Trust* (1938) 60 CLR 438; *McAsey v Lobban* [1938] VLR 140 and *Tucker v McCann* [1948] VLR 222). However, this rule is not inflexible and there are circumstances where the rule would not apply. Thus, the absence of a tail light would not be evidence of negligence when two cars collide in a head-on collision nor would the driving of a car without a licence make the driver negligent (*Woods v Davison* [1930] NI 161 (HL); *Edwards v Weeks* [1930] VLR 225; *Cassel v Thompson* [1930] 3 DLR 65 and *FT Wimble & Co Ltd v Guilleser* [1928] St R Qd 20). The driver would also not be negligent just because he uses a defective vehicle unless the defect entered into the cause of the accident (*Hopewell v Baranyay* [1962] VR 311). There are statutory rules to be complied by every driver but these statutory rules of the road do not abrogate the principles of the common law which impose upon persons using the highway the obligation *sic utere tuo ut alienum non laedas*. The cases of *Algie v DH Brown & Son Ltd* [1931] NZLR 520, GLR 221; *Duncan v Wakeford* [1941] NZLR 25 at p 29, [1940] GLR 589; *Delaney v Sweeney* [1940] SASR 244 at p 246; *Wimble & Co Ltd v Guilleser* [1928] St R Qd 20 and *Muffitt v Fleming* [1938] OR 358 lay down a singular rule to the effect that statutory rules afford an evidentiary test as to negligence which may be decisive at time and in many cases, but they cannot be conclusive. In *Forby v Laucke* [1933] SASR 60 there was a breach of regulation requiring two headlights but the court there was quite bold and held that the defendant was not contributorily negligent when a motorcyclist was misled by the defendant displaying only the near side light. I will now cite three authorities to show that breaches of statute or regulations have not been held to be evidence of negligence causing the accident:

(1) *Phillips v Britannia Hygienic Laundry* [1923] 2 KB 832, 93 LJ KB 5, 129 LT 777, 39 TLR 530 was a case where a wheel came off a coach and damaged the plaintiff's vehicle. It was unsuccessfully argued that as the regulation required vehicles to be fit for the road, the plaintiff was entitled to succeed because the defendant's vehicle was not fit.

(2) *Robertson v Carmody* [1870] 1 VLR 6 (FC) was a case which involved a regulation forbidding more than one person to be carried on box of a coach and the court there held that this was not conclusive proof of negligence.

(3) *Edwards v Weeks* [1930] VLR 225 was a case where the plaintiff was alleged to be driving a motorcycle '*without being licensed or entitled to be licensed*' and the court held that this was not negligence and struck out the allegation.

In *Wong Ah Gan v Chan Swei Yueh & Anor* [1970] 2 MLJ 25 (CA), the Singapore's Court of Appeal had to deal with the case of the first respondent who was involved in a collision with a motorcar driven by the appellant. At the time of the accident, the first respondent was riding a motorcycle and was not wearing a crash helmet and as a result be suffered deep seated brain damage. The learned trial judge held that the appellant was negligent and awarded $115,000 as damages. On appeal, it was argued that: (1) the learned trial judge should have found as a matter of law that there was a duty on the first respondent to mitigate the damages flowing from the appellant's negligence and that the failure to wear a crash helmet constituted a failure to discharge that duty; (2) the quantum of damages awarded to the first respondent represented a wholly erroneous estimate of the amount which ought to have been awarded to him. In dismissing the appeal, the Singapore's Court of Appeal held that: (1) in law there can be no duty on a person to minimise the effects or probable consequences of any injury he may suffer, but which he has not yet suffered, through the negligence of another. For a motorcyclist to ride a motorcycle without a crash helmet cannot as a matter of law constitute a failure on his part, acting as a reasonably prudent man would act to foresee that he might cause harm to himself; (2) having regard to the circumstances of the case, the trial judge's estimate of loss of prospective earning was not wholly erroneous and therefore the global award of $115,000 was also not wholly erroneous. Wee Chong Jin CJ (Singapore) delivering the judgment of the Court of Appeal (Wee Chong Jin CJ (Singapore), Tan Ah Tah and Chua JJ) said at p 27 of the report:

> Counsel for the appellant argued the first ground in this way. He submitted, having regard to the fact that we are in Singapore a highly urbanised community and to the present day road conditions in Singapore, that it is unsafe for a motor cyclist and therefore negligent on his part to ride a motor cycle without wearing a crash helmet as a protection from head injury if he is involved in a collision. He contends that in law such a person owes a duty to himself to mitigate the damages he may suffer through the negligence of other users of the road and that, as a matter of fact, the first plaintiff's failure to wear a crash helmet constituted a failure to discharge that duty.
>
> So far as the proposition of law is concerned it is admitted that there is as yet no decided authority in support of it and counsel frankly invited us 'to make new law'. We are of the opinion, however, that if we accept the proposition put forward by counsel we would be making bad law for in law there can be no duty on a person to minimise the effects or probable consequences of any injury he may suffer, but which he has not as yet suffered,

through the negligence of another. The law is clear that just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. In our opinion, for a motor cyclist to ride a motor cycle without wearing protective headgear such as a crash helmet cannot, as a matter of law, constitute a failure on his part, acting as a reasonably prudent man would act, to foresee that he might cause harm to himself. It may well be that a reasonably prudent man would foresee that the wearing of a crash helmet might result in less harm being caused by someone else to him if he is involved in a collision while riding a motor cycle.

In any event, there was no evidence at all before the trial judge that the head injury suffered by the first plaintiff would have been less serious if he had been wearing a crash helmet at the time of the accident. The onus was on the defendant on para 3A of his amended defence to introduce such evidence so as to enable the trial judge to make a finding of fact on this issue.

In my judgment, the fact that the respondent did not have a valid driving licence, and was not wearing a safety helmet and the fact that the motorcycle ridden by him was without a road tax, an insurance and was not fitted with a horn cannot in law make him negligent. There was no duty on the part of the respondent to minimise the effects or probable consequences of any injury that he may suffer, but which he has yet to suffer, through the negligence of another. It was not foreseeable for the respondent to foresee that harm would fall on others as to make him liable for actionable negligence by riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle with these extraneous factors being contravened by him would result in harm to himself and thereby contributing to the cause of the accident.

Mr Ong Chee Yong argued and it was his contention that the respondent failed to slow down, take evasive action and keep a proper look out. But the trial court did make a finding that the respondent had taken all proper steps to stop his motorcycle and the respondent too had, according to the trial court, tried to swerve to the right a little. An examination of the evidence of the respondent would now be undertaken and from it one can deduce that the respondent had taken all reasonable steps to avoid the collision when confronted with the sudden and unexpected danger posed by the first appellant. The relevant portions of the respondent testimony can be seen at p 87 E to F of AR when he was being re-examined:

Soalan: Awak cuba elak dan berek tetapi tidak sempat, apa maksud awak?

Jawapan: Saya telah memberek tapi tidak sempat elak.

Saya ada belok ke kanan sedikit tetapi juga tidak sempat.

Under examination-in-chief, the respondent testified at p 76D–E of AR:

Bila menghampiri simpang saya lihat sebuah kereta datang dari kiri saya dari Jalan Sultan Ibrahim.

Masa saya mula lihat saya berada 7 kaki dari motorkar.

Saya cuba elak tetapi tidak sempat dan kemalangan berlaku.

It is significant to note that on perusal of the notes of evidence in AR one would notice that whilst learned counsel for the appellants had

cross-examined the respondent at length on the issue of liability (at p 81 to p 86 of AR) yet the respondent was not specifically challenged in regard to the evasive action taken by him while riding that motorcycle. It is now trite law that what is not challenged or disputed is deemed to have been admitted. Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770 at pp 794–795 had this to say of that rule:

> It is essential that a party's case be expressly put to his opponent's material witnesses when they are under cross-examination. A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well.
>
> This rule as to cross-examination to which I have just adverted derives its name from the case in which it was expressed. It is the decision of the House of Lords in *Browne v Dunn* [1893] 6 R 67 where Lord Herschell LC stated the principle in this way (at p 70 of the report):
>
> > 'Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him, and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.'
>
> In the same case, Lord Halsbury had this to say (at p 76 of the report):
>
> > 'My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.'
>
> Having dealt with the evidence in that case, Lord Halsbury continued (at p 77):
>
> > 'My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at *nisi prius* if, after the learned counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the plaintiff's

proceedings, that he did receive advice, that he went round to Mr Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.' A

The rule in *Browne v Dunn* has been applied by Indian courts in the context of the Indian Evidence Act 1872, on which is based our Evidence Act 1950. I need only refer to the decision in *Carapiet v Derderian* AIR 1961 Cal 359, where Mukharji J, at p 362 of the report, expressed the principle in the following words: B

'The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponents witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the plaintiff's account in its entirely. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.' C D E

That being the case, it was my judgment that the trial court had adopted the right approach in determining liability and had drawn the proper conclusions from the evidence presented by both parties. It was not surprising when the trial court assessed the evidence and remarked that the respondent's version of the road accident was not challenged. This was what the trial court said at p 13D of AR: F

Keterangan beliau bagaimana kemalangan berlaku adalah tidak tercabar. G

Undeterred, Mr Ong Chee Yong argued vigorously that it did not follow from the fact that the respondent tried to stop his motorcycle showed that he took all proper steps to do so. The fact remained, so it was argued by Mr Ong Chee Yong, that the respondent failed to see the first's appellant's motorcar in good time. It was argued that if the respondent had kept a proper look out, the respondent would have had time to avoid the road accident. It was also argued that if the respondent had acted in good time, then the respondent can be said to have taken proper steps to stop his motorcycle. It was then argued that since the respondent saw the first appellant's motorcar when it was just seven feet away, the respondent had disabled himself from taking proper steps to avoid the road accident. I have anxiously considered the submissions of Mr Ong Chee Yong and, with respect, I found and it was my judgment that his submissions were totally H I

untenable. It must not be forgotten that the motorcycle was travelling on the major road while the motorcar was travelling along a minor road and the motorcar failed to stop at the halt line but instead proceeded ahead. To say that the motorcycle who was travelling on the major road must stop dead in its track upon seeing the motorcar entering the major road from the minor road notwithstanding the fact that the motorcar failed to stop at the halt line would simply mean that traffic on the major road would come to a stand still. That would not be the law in this country.

Be that as it may, the trial court had made a specific finding of fact that the respondent had taken all reasonable steps to avoid the collision. At p 15F to p 16A of AR, the trial court rightly surmised:

> Mahkamah mendapati plaintif (referring to the respondent) telah mengambil semua langkah yang munasabah untuk mengelak kemalangan.

Further down the judgment, the trial court at p 16D to 16E of AR, remarked and in the process rounded up the evidence by saying:

> Plaintif (referring to the respondent) juga telah mengambil langkah-langkah yang munasabah dengan memberhentikan motor beliau dan cuba elak ke kanan sedikit.

An argument was advanced to the effect that the respondent should be found guilty of contributory negligence because he only saw the first respondent's motorcar at a distance of about seven feet. But the trial court made a finding of fact that the respondent only saw the first appellant's motorcar when it was seven feet away from his motorcycle (see p 16D of AR) and this finding of fact was amply corroborated by the evidence adduced before the trial court as can be seen at p 76D and p 87D of AR. The respondent was quick on the uptake and he gave a reason as to why he did not see the first appellant's motorcar further than the distance of seven feet. In the respondent's own words at p 77A of AR:

> Kawasan itu terlindung oleh pokok-pokok. Pokok-pokok terdapat di kiri jalan sebelum simpang.

and the trial court accepted the reason of the respondent when it said at p 16D of AR:

> Mahkamah juga berpendapat plaintiff (referring to the respondent) hanya melihat kenderaan defendan pada jarak tujuh kaki kerana dilindungi oleh pokok-pokok ditepi jalan. Fakta mengenai pokok-pokok di sokong oleh pegawai penyiasat SP5.

It seemed that the evidence of the respondent in regard to the presence of the trees on the respondent's left side of the road was corroborated by the investigating officer of the case, one Sargeant 31969 Sharif bin Werdan.

Undeterred, Mr Ong Chee Yong argued that the trial court had fallen into an error — a grave error, when the trial court accepted the respondent's evidence in toto without embarking on a proper scrutiny of the evidence. Three reasons were advanced by Mr Ong Chee Yong:

(1) That the respondent himself admitted during cross-examination that the motorcar could have been seen before reaching the junction and reference was made to p 82A of AR where the respondent was being cross-examined:

> Soalan: Berapa jarak dari simpang awak boleh lihat motorkar?
>
> Jawapan: Sebelum sampai kepala simpang sudah boleh lihat motorkar.

But with respect, the learned counsel conveniently omitted the very next line to the evidence of the respondent at p 82B of AR where the respondent testified that:

> Jarak tujuh kaki yang saya maksudkan ialah jarak motorsikal ke kereta.

(2) The sketch plan at p 156 of AR showed the width of Jalan Sultan Ibrahim, the road on which the first appellant's motorcar was travelling, to be 6.5 metres or 21.3 feet wide and, consequently, it was argued that the respondent could have seen the first appellant's motorcar when his motorcycle was more than seven feet away from the first appellant's motorcar.

Again with respect, the possible or probable visibility as argued by the appellants' counsel was nothing but mere conjecture riddled with speculation and unsupported by not even an iota of evidence.

(3) The investigating officer testified as to the presence of the trees before reaching the junction and he testified that the trees did not hamper the motorcyclist's view of the vehicles at the Jalan Sultan Ibrahim's junction. The investigating officer also stated that vehicles travelling along Jalan Sultan Ibrahim, the very road which the first appellant's motorcar was travelling, could be seen 10 metres before the edge of Jalan Sultan Ibrahim and this was in relation to line 'A' in the sketch plan. Now, using the evidence of the investigating officer as a leverage it was argued that taking the width of the road into consideration, it meant that the respondent could have seen the first appellant's motorcar when it was at least 15 metres away if the respondent had kept a proper look out. That being the case, so it was submitted, the trial court had failed to scrutinize the evidence in its correct perspective and the acceptance of the evidence of the respondent to the effect that the respondent was unable to see the first appellant's motorcar until it was just seven feet away was said to be contrary to the evidence. For these reasons, it was submitted that the respondent had failed to keep a proper look and that the respondent had ridden the motorcycle on the road without due care and attention.

With respect, the analysis of the investigating officer's evidence was way off tangent. The investigating officer had said in no uncertain terms that there were trees on the respondent's left side of the road and that the place in question was hilly. In my judgment, the trial court was entitled to conclude after taking all the relevant factors into consideration including the vegetation that visibility at the scene of the accident was indeed limited. The

investigating officer's testimony regarding the distance of visibility was but a mere opinion of his. Under re-examination, the investigating officer admitted that it was just an estimate and this was what he said at p 93E of AR:

> Jarak 10 meter yang saya beritahu dimana kenderaan boleh melihat kereta di simpang Jalan Sultan Ibrahim adalah jarak anggaran.

Next, it was argued that the fact that at all material times the respondent was riding the motorcycle about three feet from the edge of the road and had kept a speed of 40 km per hour then it must be inferred that the respondent could not have taken the necessary and crucial steps to avoid the collision. This argument borders on triviality and it shows a blatant failure to consider the evidence of the respondent in its entirety. It was obvious that the respondent had kept the distance and speed as alluded to by him just before the accident. All of a sudden the first appellant created the dangerous situation by not stopping at the halt line and proceeded straight into the major road from the minor road and as a result the respondent was compelled to take immediate evasive action. In an emergency everyone must act fast and the respondent was no exception. Under such an extreme situation, the immediate concern of the respondent would have been simply to save his own life. That must be uppermost in the respondent's mind and the respondent swerved to the right but it was too late. In that situation, you can't expect the respondent to keep track of his speed and how much he had swerved. In its proper context, the evidence of the respondent showed conclusively that he did not contribute to the accident and the author of that unfortunate accident was the first appellant and no one else. This was my judgment and I so hold accordingly.

An argument was also advanced to the effect that the failure to sound the horn had contributed to the motor vehicle accident. Under cross-examination, the respondent testified at p 82B–C of AR:

> Soalan: Awak tidak sempat bunyi hon?
>
> Jawapan: Motosikal saya tidak ada hon.

And clearly that motorcycle was without a horn. With this piece of evidence, it was submitted that if the respondent's motorcycle had a horn, its use could have averted the accident from happening in that the use of the horn in good time could have warned the first appellant of the respondent's approach. It was argued that the respondent's failure to equip his motorcycle with a horn, disabled the respondent from being able to warn others of his presence on the road when danger was apparent and looming ahead of him. The trial court in its judgment at p 16E of AR said aptly that:

> Walaupun katakanlah motorsikal plaintiff (referring to the respondent) mempunyai horn dan jika hon di gunakan pada jarak tujuh kaki dari kereta ia tidak akan mengubah keadaan.

and this meant that the trial court had gone a step further to envisage a situation that even if the motorcycle was fitted with a horn the accident

could not be avoided because of the distance of the motorcycle to the motorcar was only seven feet. Bluntly put, the accident was caused by the negligence of the first appellant in suddenly turning across the path of the respondent without stopping at the halt line and in such a situation no amount of honking would prevent the accident from occurring. It would be preposterous to suggest that every motorist travelling on the main road should sound his horn each time the motorist approaches a junction on a minor road. On the effect of horning, reference to three cases should be made. The first would be the case of where the late Abdoolcader J (who later rose to be a senior SCJ) said at p 270 of the report:

> He maintained that the deceased was wholly negligent but conceded that there might have been contributory negligence on the part of the defendant in that event to the extent of 10 per centum in the sense that he should have been more careful and should have sounded his horn. I would only observe in this connection that PW2 had stated that the defendant sounded his horn on overtaking the other two cars, but on the defendant's version of what transpired that evening, I would have thought that sounding his horn would have hardly made any difference when the cyclist was alleged to have cut right across his path at a distance of only 10 feet from his car which was travelling on his affirmation at a speed of about 35 mph.

The futility of sounding a horn was also stressed by Chang Min Tat FJ in *Kek Kee Leng v Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 (FC) particularly at p 63 where his Lordship speaking for the Federal Court succinctly said:

> Secondly, with regard to the question of failure to reduce the speed, sound the horn or taking steps to avert the collision, all these acts, in my view, would depend on how close the plaintiff was to the second defendant's motor-car when the latter emerged suddenly from the side road onto the main road. It seems to me that no useful purpose would be served in sounding the horn to attract the attention of the second defendant as the latter's motor-car had already started to come out onto the main road from the side road.

Sitting in the High Court, Chang Min Tat FJ in *Murugan v Lew Chu Cheong* [1980] 2 MLJ 139 at p 140, emphasised the same point in these words:

> But I also take the view that when an emergency is suddenly created, then the use of a horn is meaningless for the avoidance of an accident.

The same would also be true in the present appeal. It would be entirely meaningless to sound the horn when the emergency suddenly developed beyond the control of the respondent.

It is germane at this juncture to take stock of the situation and look at the facts of the present appeal again. In summary, the facts may be stated thus:

(1) A collision occurred between a motorcycle travelling along a major road and a motorcar travelling along a minor road and entering the main road without stopping at the halt line.

(2) The motorcar coming from the minor road not only did not stop at the halt line but also failed to slow down when approaching the junction and the first appellant as the driver of that motorcar did not see the motorcycle on the main road until he was very close to it.

(3) The rider of the motorcycle took an evasive action to avoid the collision but it was to no avail. The accident could not be avoided.

(4) The driver of the motorcar — namely, the first appellant had pleaded guilty to a charge of careless and inconsiderate driving and had been sentenced.

All these facts point conclusively to the negligence of the first appellant — the driver of the motorcar and liability of the first appellant was on the basis of 100%. The respondent did not contribute to the accident at all.

Entering major road from minor road without stopping and resulting in a road collision

Rule 18 of the Highway Code 1959 (LN 165/1959) states that when turning left or right drivers must always give way to through traffic, including pedestrians. Section 68(3) of the Road Transport Act 1987 enacts that a failure on the part of any person to observe any provisions of the highway code shall not of itself render that person liable to criminal proceedings of any kind, but any such failure may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings. There is also a principle of law that says that a motorist travelling along a minor road has a duty to stop at the junction and allow vehicles travelling on the main road to pass first before entering the major road. Authorities on this point are abound. The Federal Court in *Mohamed Repin v Lim Yu Kee* [1969] 1 MLJ 64 spoke of the duty of a driver of a motor vehicle emerging from a minor road to the path of a traffic on a major road. That was a case of a collision between a motor van and a motor bus at the junction of a major and a minor road. In the High Court, Chua J found the driver of the motor van who was travelling along the minor road to be negligent and to be blamed for the accident as he had failed to stop at the halt line at the junction and had gone onto the path of the traffic on the major road. Chua J was further of the view that even if the driver of the motor bus had seen the motor van coming towards the junction, he — the driver of the motor van, was justified in assuming that the motor van would halt at the stop sign and his Lordship concluded that the accident was due solely by the negligence of the motor van driver. This was what Chua J said at p 66 of the report:

> There is no doubt that the van did not stop at the halt line but proceeded at speed to try and beat the traffic which was on a major road. Clearly therefore the first defendant was to blame.
>
> Even accepting the story of the first defendant to be true that he stopped at the halt line, nevertheless, he was to blame for the accident as he should have stopped there a bit longer to allow the bus, which was travelling on a

major road and coming from his right, to pass before attempting to cross the junction. Instead of doing that he took a risk and crossed the junction in the face of the oncoming bus. A

His Lordship Chua J further said at the same page the following:

> Can it be said that the third defendant was negligent in not seeing the van in Dunman Road some way back from the Halt line? I cannot take such a view. Even if the third defendant had seen the van in Dunman Road coming towards the junction he was justified in assuming that the van would halt at the Halt line. As Lord Justice Willmer said in the case of *Brooks v Graham and Berrington* (a 1964 Court of Appeal Case which is unreported and a copy of the judgment was put in by consent by counsel for the second and third defendants):- B C
>
> > 'Assuming, therefore, that Mr Berrington had seen Dormobile van at the time when he reached the cross-roads, he would have been right to go on as he was going so as to get across; he would have been right to assume that the Dormobile would stop at the Halt line and allow him to do so. It appears to me that this is a feature of the case which the learned judge has overlooked. He has treated the case as though it were one of a collision at an uncontrolled cross-road, or a cross-road subject only to a Slow sign. It seems to me that, when one is dealing with a cross-road subject to a Halt sign, wholly different considerations apply. If a vehicle on the major road is to approach such a cross-road in such a way that it can stop dead if a vehicle on the minor road fails to observe the Halt sign, it would mean that it would have to slow down to little more than walking pace. That would have the effect for all practical purposes of bringing traffic on the major road to a standstill. That, as I said earlier, would represent a wholly unrealistic view of the requirements of present day traffic conditions.' D E

Since the plaintiff in *Mohamed Repin v Lim Yu Kee* merely appealed against the quantum of general damages awarded by the High Court, I need not dwell on the decision of the Federal Court (Wee Chong Jin CJ, Tan Ah Tah FJ and Winslow J) on the matter. F

The next authority worthy of mention would be that of *Ong Sim Moy & Ors v Ong Sim Hoe* [1969] 1 MLJ 82, a decision of Winslow J. That was a case where a cyclist coming from a minor road was killed in a collision with a lorry on the main road and the learned judge found that the deceased cyclist was wholly to blame even assuming that he had previously stopped at the halt line. This was what the learned judge said at p 83 to p 84 of the report: G

> Taking all the matters before me into account, however, it seems to me that the cyclist was wholly to blame even assuming that he had previously stopped at the '*Halt*' line. It was contended on his behalf that the defendant should have seen him inside Jalan Kayu and proceeded with caution accordingly so as to avoid a collision. I am of the view that this argument can also be advanced with even greater force the other way, namely, that the cyclist should have seen the lorry approaching from his right and waited a little longer in order to ensure that the major road was safe to turn into before he proceeded to turn right. Following the reasoning of Chua J in the case of *Mohamed Repin*, to which I have referred earlier, the cyclist should have stopped a little longer at the '*Halt*' line before attempting to turn into Yio Chu Kang Road. Instead H I

of doing that he took a risk and crossed in the face of the oncoming lorry which I find was travelling at a moderate speed on a major highway. In my view, the defendant did all he could, in the circumstances, to avoid a collision by applying his brakes and swerving to his right and the damage shows fairly clearly that the cyclist ran into the front offside mudguard of the lorry. This is supported by the direction of the brake mark *QR* which, even if it were made by the nearside tyres of the lorry, commenced on the defendant's side of the road. There was no other traffic and it is difficult to see what other avoiding action the defendant could have taken at the junction, lit only by one street lamp as it was, short of literally crawling along at walking pace in order to ensure that no foolhardy or reckless person would come shooting out of Jalan Kayu into his path with a view to crossing in front of the lorry rather than behind it. Counsel for the plaintiffs sought to impose a heavier duty of care on the defendant than on the deceased mainly on the ground that the deceased was only a cyclist whereas the defendant was in charge of a lethal weapon like a lorry. That may well be so but I am quite satisfied that the cyclist was turning right into Yio Chu Kang Road when it was absolutely unsafe to do so, if not extremely dangerous. In the face of the authorities I find myself unable to allow my sympathies with the plaintiffs on their bereavement and their consequential loss of a bread-winner to decide, following *Lang*'s case, that the possibility of danger was so apparent as to necessitate a finding of even a slight degree of negligence on the part of the defendant. In *Lang*'s case the accident took place in broad daylight. Moreover, there was only a '*Slow*' sign at the junction and not a '*Halt*' sign. Further the bus driver saw some traffic to his left and the sudden appearance of the motor cyclist was not entirely unexpected.

There was nothing before me to show that the defendant had not had an unblemished career as a lorry driver hitherto. He has been driving along that route for more than 10 years. If I were to find some degree of negligence on the defendant's part in this case on the evidence adduced, I would be driven to a situation where I should have to find almost every defendant guilty of some negligence whether or not he was, in fact, negligent just because somebody had been injured or killed in a collision. I therefore regret that the plaintiff's claim must be dismissed with costs.

Another authority of interest would be *Yap Yew Yee v Subramaniam & Anor* [1972] 2 MLJ 53 where at the time of the accident the defendants' motor taxi was proceeding along a major trunk road when the plaintiff's motorcycle suddenly emerged from a minor estate road on the left hand side from a distance of about 30 feet away and the two vehicles then collided into one another. Mohamed Azmi J (who retired as a senior FCJ) held that the taxi driver, on the main trunk road was entitled in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motorcyclist coming from a minor side road to assume that the motorcyclist would stop at the junction and give him the right of way. In the circumstances there was nothing the taxi driver could do to avoid the accident. Mohamed Azmi J (who retired as a senior FCJ) brilliantly said at p 55 of the report:

I think the taxi-driver on the main road was entitled, in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motorcyclist coming from a minor side road, to assume that the motorcyclist would stop at the junction and give him the right of way. There was nothing

the taxi-driver could have done to avoid the accident, short of stopping immediately and allowing the plaintiff to pass in front of him, which under the circumstances of the present case was quite impossible. I think the folly of the plaintiff in entering into the main road without stopping at the junction cannot be regarded as reasonably foreseeable. Thus, in the Federal Court case of *KR Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49 at p 53, Ong FJ (as he then was) observed:

> 'With respect, it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists . ...
>
> The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motor cars and motorcycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down.'

Both on the facts and the law, I have no alternative but to find that the plaintiff is wholly to blame in this unfortunate accident.

Likewise in the present appeal, the first appellant was totally to blame for the accident. The facts and the law all favoured the respondent.

Contributory negligence

Mr S Gunasegaran, learned counsel for the respondent, drew my attention to the classical case of *Govinda Raju & Anor v Laws* [1966] 1 MLJ 188, a decision of Raja Azlan Shah J (as His Majesty then was). That was a case where the plaintiff's motorcycle collided into the rear of the defendant's motorcar when the latter swerved right across the path of the plaintiffs. The defendant argued that the plaintiffs had contributed to the accident by driving at an excessive speed and failing to take proper steps to avoid the collision. Raja Azlan Shah J (as His Majesty then was) rejected the defendant's contention and succinctly said at p 190 of the report:

> It is the case of a moving vehicle trying to turn right in the path of an on-coming motor-cycle and intending to enter a lane to a house. The plaintiff saw the motor-vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs.

and although the facts may be slightly different from our case yet the principle enunciated therein can be applied to the present appeal.

The case of *KR Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49 (FC) was a case of a collision between a motor taxi travelling along a major road and a motorcar entering the major road from the minor road resulting in the death of a passenger in the motor taxi. Ong Hock Thye FJ remarked at p 53 of the report:

> Merely because drivers of motor cars and motor-cycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down.

Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50 was also a case emanating from the Federal Court. That was a case where there was a collision between a vehicle on the main road and another vehicle coming out of the minor road. The learned judicial commissioner held that the driver of the vehicle coming out of the minor road was solely liable. The Federal Court dismissed the appeal on liability and this was what Mohamed Azmi FJ said at p 51 of the report:

> On the issue of liability, we do not think that the learned Commissioner was wrong in law or in fact in his conclusion. From the whole evidence including the sketch plan, the second appellant was correctly held entirely to blame. There was no dispute that the respondent was proceeding along a major road (Jalan Abdul Rahman) from the direction of Muar Town towards Kampong Parit Jawa and the second appellant was coming out from a minor road (Jalan Sultan Ibrahim) into the main road intending to turn right towards Muar. There was evidence to support the conclusion that he did not stop at the 'Stop Look Go' sign at the junction before turning right into the main road and was therefore guilty of negligence in colliding into the respondent but it was the appellants' contention that the accident was contributed to by the respondent's own negligence in giving light signal to turn right into a minor road (Jalan Parit Haji Maki) and then suddenly changing his mind by going back to his former position and proceeding straight on towards the direction of Kampong Parit Jawa. Even if the respondent did change his direction (which the respondent denied and the denial was accepted by the learned Commissioner) we are satisfied that the collision could not have occurred if the appellant's motor car had stopped at the junction and allowed the respondent's motor cycle which had the right of way to pass the junction completely first before turning right into the main road. Applying the test set by this court on contributory negligence in *KR Taxi Service Ltd & Anor v Zaharah & Ors* [1969] 1 MLJ 49 and *Tan Tsin Keong v A Somanaidu* FCCA No 23 of 1972, the respondent was obviously blameless and we find the appeal against liability has no merit whatsoever.

Mr Ong Chee Yong cited the case of *Siow Choo Foo v Lee Peng Lay & Anor* [1981] 2 MLJ 336, a decision of the late Yusof Abdul Rashid J sitting in the

Muar High Court. That was a case where the plaintiff suffered personal injuries and loss as a result of a collision between his motorcycle and the defendant's lorry. The learned judge accepted the plaintiff's evidence that the defendant's motorlorry was stationary with its rear lights switched off when the collision took place and the learned judge held that to leave a stationary lorry on the road on a dark night with its tail lights off was potentially a dangerous act and an act lacking the duty of care owed to the other users of the road and his Lordship held that the first defendant was to blame for the collision. His Lordship further held that the plaintiff too owed a duty of care for his own safety. On being blinded by the glare of the headlights of the on-coming vehicle, it would be prudent for the plaintiff to slow down his speed considerably, or even to pull to the side for safety. And his Lordship concluded that the plaintiff 'did not in his own interest take reasonable care of himself and contributed by his want of care, to his own safety' and accordingly his Lordship held that the first defendant was $^{2}/_{3}$ to blame and the plaintiff was $^{1}/_{3}$ to blame for the accident. At p 337 to p 338 of the report, his Lordship laid down the law on contributory negligence in these words:

> However, the plaintiff too owed a duty of care for his own safety. Relying on the evidence of the plaintiff himself it was evident that the plaintiff was guilty of contributory negligence. In *Davies v Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291, Bucknill LJ said at p 308:
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> > '... When one is considering the question of contributory negligence, it is not necessary to show that the negligence constituted a breach of duty to the defendant. It is sufficient to show lack of reasonable care by the plaintiff for his own safety. That is set out clearly in the speech of Lord Atkin in *Caswell v Powell Duffryn Associated Collieries, Ltd*, [1940] AC 152 at p 164 as follows:
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> > > "But the injury may be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or the property that is used by the ordinary reasonable man in those circumstances ... ."
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> Dealing with the concept of contributory negligence, Viscount Simon, who delivered the judgment of the Privy Council in *Nance v British Columbia Electric Railway Co Ltd* [1951] 2 All ER 448, said at p 450:
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> > "... The statement that, when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendants to the plaintiff to take due care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury, he cannot call on the other party to compensate him in full. This view of the matter has recently been expounded, after full analysis of the legal concepts involved and careful examination of the

> authorities by the English Court of Appeal in *Davies v Swan Motor Co (Swansea) Ltd* [1949] 1 All ER 620, to which the Chief Justice referred. This, however, is not to say that in all cases the plaintiff who is guilty of contributory negligence owes to the defendant no duty to act carefully. Indeed, it would appear to their Lordships that in cases relating to running-down accidents like the present such a duty exists. The proposition can be put even more broadly. Generally speaking, when two parties are so moving in relation to one another as to involve risk of collision, each owes to the other a duty to move with due care, and this is true whether they are both in control of vehicles, or both proceeding on foot, or whether one is on foot and the other controlling a moving vehicle. If it were not so, the individual on foot can never be sued by the owner of the vehicle for damage caused by his want of care in crossing the road, for he would owe to the plaintiff no duty to take care. Yet, such instances may easily occur, eg if the individual's rashness causes the vehicle to pull up so suddenly as to damage its mechanism, or as to result in following traffic running into it from behind, or, indeed, in physical damage to the vehicle itself by contact with the individual. When a man steps from the kerb into the roadway, he owes a duty to traffic which is approaching him with risk of collision to exercise due care ... ".
>
> In the instant case, on being blinded by the glare of the headlights of the on-coming vehicle, it would be prudent for the plaintiff to slow down his speed considerably, or even to pull to the side for safety. In evidence, the plaintiff said that he proceeded on without taking any other action. As such, the plaintiff 'did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury'.'

By citing *Siow Choo Foo v Lee Peng Lay & Anor*, Mr Ong Chee Yong sought to justify his submission that both parties in the present appeal were equally negligent and the respondent should bear the liability at 50% since he too contributed to the accident. I must at once say that the facts in the present appeal were poles apart from *Siow Choo Foo v Lee Peng Lay & Anor*. Our present appeal was a clear cut case of the first appellant driving a motorcar on a major road and entering a minor road without stopping at the halt line which resulted in a collision with the respondent who was riding a motorcycle on the main road.

Two other authorities must be cited to show that the courts have held both parties equally to blame for the accident. I shall refer to the first case and that would be the case of *Hussein & Anor v Maiden* [1970] 1 MLJ 114 which was a collision between the plaintiff on the bicycle and the second defendant driving a motorcar. The High Court judge found that both the plaintiff and the second defendant to be negligent on a 50-50 basis. In dismissing the appeal, Azmi LP had this to say at p 115 of the report:

> In the present case, however, both the motorist and the cyclist could have seen each other if they had taken a proper look-out and in my view the motorist also owed a duty when travelling on a major road to be on the lookout for other users of the road coming out of a minor road and if he failed to do so he must also be regarded as being negligent (see *Williams v Fullerton* (1961) 105 Sol J 280).

Next, it would be the case of *Tan Ah Hoong v Mahalingam* [1962] MLJ 250 where a motorist driving an Opel Rekord was travelling quite fast on the main road when he saw the deceased pedalling his trishaw on the minor road which had a 'Slow. Major Road Ahead' sign. The motorist defendant did not expect the deceased trishaw peddler to enter the main road suddenly which the deceased did. A collision occurred and the deceased died as a result of that accident. Suffian J (who retired as the Lord President of the then Supreme Court) succinctly said at pp 251–252 of the report:

> The defendant says that before the accident he saw the deceased pedalling his trishaw on Barracks Road which joins Jalan Raja. Nevertheless the defendant accelerated and his explanation was that he was on a major road while the deceased was on a minor road which had a 'Slow. Major Road Ahead' sign. The defendant did not expect the deceased to enter the major road suddenly, which, according to the defendant and I agree, the deceased did. The defendant could have avoided a collision if he had swerved to the left, but he did not do so as there were many cars parked at right angle to the kerb on that side. Nor did he swerve to the right as he said swerving to the right was a dangerous manoeuvre in ordinary circumstances, though he admitted there was no oncoming traffic at that time. In cross-examination the defendant admitted that he did not take into consideration the fact that the deceased might have entered the major road suddenly.
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> As to this, Viscount Dunedin in *Fardon v Harcourt-Rivington* (1932) 48 TLR 215 at p 216; [1932] All ER Rep 81 said:
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> > 'If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.'
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> In a later case *London Passenger Transport Board v Upson* [1949] 1 All ER 60 at p 70 Lord Uthwatt said:
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> > 'A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take.'
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> In my judgment, the danger of the deceased suddenly entering the major road (particularly as there is, to the knowledge of the defendant, a slope at the mouth of the minor road) was not a mere possibility which would never have occurred to the mind of a reasonable man; the possibility of such danger should have been reasonably apparent to the defendant and yet he took no precautions. He was not entitled not to put out of consideration the folly of the deceased suddenly entering the major road and yet the defendant did so. As:
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> > 'The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has become a lethal weapon. (per Stable J in *Daly v Liverpool Corporation* [1939] 2 All ER 142 at p 144). '
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> I find that the defendant was guilty of negligence.
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> The next question which arises is whether or not the deceased was himself guilty of contributory negligence. As to this, Lord Simon in *Nance v British Columbia Electric Railway* [1951] AC 601 at p 611 stated:

> 'When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove ... that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury'.

Further down the same case, Suffian J (who retired as the Lord President of the Supreme Court) continued in these words:

> In *Lang v London Passenger Transport Board* [1959] 3 All ER 609 it was held that a motor cyclist, emerging into a major road at a speed of 20 miles an hour from a minor road without slowing at a 'Slow. Major Road Ahead' sign, who was run into and killed by a bus travelling on the major road at about the same speed, was much more responsible for the accident than the driver of the bus and the blame was apportioned as follows, as to two-thirds to the motor cyclist and one-third to the defendant. I wondered whether to divide the blame in this case in the same proportions, but after careful consideration I am of the opinion that both parties were equally to blame and I accordingly find.

Must I follow dutifully these two authorities, namely *Hussein & Anor v Maiden* and *Tan Ah Hoong v Mahalingam* and hold both parties equally to blame? Certainly not. I prefer to follow the decision of Ong Hock Thye FJ in *KR Taxi Service Ltd & Anor v Zaharah & Ors* where his Lordship set aside the decision of Raja Azlan Shah J (as His Majesty then was) in the High Court in regard to apportionment of liability. At p 51 of the report, Ong Hock Thye FJ said:

> The learned trial judge had held the Penghulu (third respondent) primarily to blame but also assessed the liability of the taxi-driver (second appellant) at 25 percent. We allowed the appeal and now state the grounds of our decision.

and at p 53 of the report, Ong Hock Thye FJ rounded up by saying:

> I would allow this appeal in respect of the second appellant's liability for contributory negligence; the judgment of the learned trial judge is affirmed as to the finding of negligence against the third respondent, who consequently is wholly liable.

Incidentally, Suffian and McIntyre FJJ who were panel members concurred with the decision of Ong Hock Thye FJ in *KR Taxi Service Ltd & Anor v Zaharah & Ors*.

It would be germane at this junction to define the meaning of negligence by referring to some authorities. I will start by referring to the case of *Blyth v Birmingham Waterworks Co* (1856) 11 Exch 781 at p 784 where Alderson B defined negligence as 'the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 at p 580 used a common sense approach when he said that 'you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' His Lordship then went on to describe the neighbour to be 'persons who are so closely and directly affected by my act that I ought reasonably to have them

in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. Yet another definition of negligence emerged in the case of *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at p 392 where Lord Dunedin described it in this manner:

> If the possibility of the danger emerging is reasonably apparent, then to take no precaution is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. In other words, people must guard against reasonable possibilities, but they are not bound to guard against fantastic possibilities.

In the context of the duty of the driver of a motor vehicle, Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155 at p 173 said:

> I desire only to register my dissent from the view expressed by the Master of the Rolls that drivers 'are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians, will behave with reasonable care'. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

Slade J said in the case of *Berrill v Road Haulage Executive* [1952] 2 Lloyd's Rep 490 at p 492 the following:

> Now, what is the duty of a driver of a motor vehicle? Paraphrasing the words of Lord Uthwatt in *London Passenger Transport Board v Upson & Anor* [1949] AC 155 at p 173, it is really this. You are not bound to foresee every extremity of folly which occurs on the road. Equally, you are certainly not entitled to drive upon the footing that other users of the road, either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently.

Contributory negligence or shared responsibility would be the damage which a person suffers as a result partly of his own fault and partly of the fault of any other person or persons. The damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable bearing in mind and having regard to the claimant's share in the responsibility for the damage. There must be some act or omission on the plaintiff's part which has materially contributed to the damage caused. It is the failure by a person to use reasonable care for the safety of himself and so he becomes blameworthy in part as an 'author of his own wrong.' Perhaps the best definition of 'contributory negligence' can be found in the case of *Nance v British Columbia Electric Railway Co Ltd* [1951] AC 601 at p 611 where Lord Simon said:

> When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the

A whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.

Every case must be viewed separately and on its own facts. I accepted, just like the trial court did, the evidence of the respondent. In my judgment, the B respondent took reasonable care of himself when he rode the motorcycle along Jalan Sultan Abu Bakar. The respondent was not part author of his own injury and he was thus entitled to be compensated in full by the appellants. This was my judgment and I so hold accordingly. The respondent was in a dilemma when the first appellant did not halt at the halt line and instead negligently proceeded ahead to the main road and thereby C caused the collision. The first appellant negligently placed the respondent in a situation of danger and this compelled the respondent to act quickly in order to extricate himself from that precarious and dangerous situation by swerving to the right. In doing what the respondent did to extricate himself from that precarious and dangerous situation this court cannot hold the D respondent to have contributed to the accident even if the benefit of hindsight showed that that was not the best way to get out of the difficulty. Lord Hailsham puts it rather well in the case of *Swadling v Cooper* [1931] AC 1 at p 9:

> E Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.

From the available evidence, the appellants failed to discharge the burden of proving contributory negligence on the part of the respondent. It was not F for the respondent to disprove it. The onus was on the appellants to show that the respondent's contributory negligence was the co-operating cause (*Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 152 at p 172) and sad to say the appellants failed in this portfolio. In *Lewis v Denye* [1939] 1 KB 540 at p 554, du Parcq LJ aptly said:

> G In order to establish the defence of contributory negligence, the defendant must prove first, that the plaintiff failed to take 'ordinary care of himself' or, in other words, such care as a reasonable man would take for his own safety, and, secondly, that his failure to take care was a contributory cause of the accident.

H In my judgment, from the available evidence, the respondent had taken ordinary care of himself when he rode that motorcycle on that stretch of Jalan Sultan Abu Bakar and the respondent too had acted as a reasonable man when he rode that motorcycle for his own safety; and, consequently, the respondent did not contribute to the accident. Of course, what the respondent was reasonably expected to do must vary according to the I circumstances and conditions of the road at the prevailing time. Looking at the facts of the present appeal, the sole author of the accident was the first appellant while the respondent was absolutely free from blame.

Pleading guilty

The first appellant pleaded guilty to a charge of careless and inconsiderate driving under s 43(1) of the Road Transport Act 1987 and this piece of evidence would be admissible evidence for this court to consider. In *Noor Mohamed v Palanivelu & Anor* [1956] MLJ 114, Buhagiar J had this to say on the same point (at pp 115–116 of the report):

> Apart from the inconsistent stories of the plaintiff and of the defendant, the only other evidence consists of an admission which the first defendant made before the Magistrate on a charge for inconsiderate driving when he pleaded guilty. The first defendant admitted being charged as in Ex P1, and that the charge was read and explained to him; he said that he was asked whether he had parked the lorry in a certain way; at first he pleaded not guilty but on the second appearance before the Magistrate he pleaded guilty. There is no question that the facts on which the first defendant was charged referred to the facts which form the subject matter of this suit and that being so the plea of guilty in that trial is admissible as an admission against the first defendant — see *Hollington v F Hewthorn and Co Ltd & Anor* [1943] 1 KB 587, where at p 600, Goddard LJ said:
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> > 'In the present case, had the defendant before the magistrates pleaded guilty or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved, but not the result of the trial.'
>
> On behalf of the defendants, it was submitted that in criminal charges of this nature it very often happens that an accused pleads guilty to avoid the further complications and expense of a trial and that in the present case Ramasami, the instructor, DW7 had actually advised the first defendant not to plead guilty. I do not see much force in that argument and while the plea of guilty is not necessarily conclusive evidence of the first defendant's negligence in the present suit it is an admissible admission which supports the plaintiff's case and which weighs against the defendant.

Raja Azlan Shah J (as His Majesty then was) in *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 at p 121 echoed the same sentiments:

> Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighs against the fourth defendant: see *Noor Mohamed v Palanivelu* [1956] MLJ 114. Mr Joseph has criticised this aspect of the evidence, saying that not only were the facts not put to his client but they were not admitted by him. This, he says, is a serious defect which affects its weight. That is an ingenious way of reasoning, but I think it is too late in the day to attack the record. I take the record as I find it.

Again, in *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194, Raja Azlan Shah J (as His Majesty then was) said at p 196 of the report:

> The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed v Palanivelu* [1956] MLJ 114; *EA Long v Wong Chin Wah* [1957] MLJ 163.

Harun M Hashim SCJ in *Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473 at p 476 adopted the same stand and this was what his Lordship said:

> With regard to the learned judge's admission of the fact that the defendant had pleaded guilty to a charge of dangerous driving we would refer to two decisions of Raja Azlan J (as he then was). In *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1966] 1 MLJ 120 he said at p 121:
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> > 'Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighs against the fourth defendant: see *Noor Mohamed v Palanivelu* [1956] MLJ 114.'
>
> And in *Lim Ah Tok v Ang Yau Chee & Anor* [1969] 2 MLJ 194 where he said at p 196:
>
> > 'The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed v Palanivelu* [1956] MLJ 114, *EA Long v Wong Chin Wah* [1957] MLJ163.'
>
> We are of the view that it was proper for the learned judge to admit the evidence of the plea of guilty by the defendant in this case. We are also of the opinion that the learned judge's finding that the defendant was wholly negligent did not rest entirely on the admission of this evidence but on the totality of the evidence before him. On the evidence as a whole, we agree with the learned judge's finding that the defendant was 100% to blame for the accident. The appeal on the point of negligence is thus dismissed.

Of pertinent to note and certainly of great significance to the present appeal would be the decision of the Federal Court in the case of *Chow Kay Kong v Ching Tong & Ors* [1967] 2 MLJ 31. That was a case where the Federal Court upheld the decision of the High Court which precluded the first defendant who had pleaded guilty to a charge of careless and inconsiderate driving, from raising the defence of contributory negligence. Ong Hock Thye FJ at p 32 of the report had this to say:

> The main question raised in this appeal is whether the learned trial judge was right to treat the first defendant's plea of guilty as an admission of such a nature as to preclude the court from entertaining a case of contributory negligence against the other defendant.
>
> I note that oral judgment was given the day after the trial. Reading the judgment itself it is clear that the judge had taken time to consider not only the authorities cited to him but also the facts. Perhaps, with respect, the phrase he used, 'not open to me etc.,' could have been more happily worded. Nevertheless, in the same sentence and in the context of the judgment as a whole, due regard had been given to the facts in evidence. The first defendant had had every opportunity to explain his previous unqualified admission of liability. He did not seek to lay the blame, or a part of it elsewhere. The judge, in my opinion, quite rightly took this fact into account: see *Hollington v Hewthorne* [1943] KB 27 and *Ingram v Ingram* [1956] 2 WLR 782. For my own part, I think it is sufficient to say that, where the evidence on both sides was so evenly balanced that the judge had to look for evidence elsewhere to decide the issue, it is abundantly clear that the appellant had failed to

discharge the onus of proof which rested on him as plaintiff: see *Robins v National Co Ltd & Ors* [1927] AC 515. Were I to try the case myself I should have come to the same conclusion.

I too share the sentiments of these learned judges. Having pleaded guilty, the first appellant must now be barred from raising the defence of contributory negligence.

Findings of fact

The appellate court would be slow in interferring with the findings of fact by the trial court. The same would be true in the present appeal. I need only to refer to the case of *Mathavan a/l Shunmugam v Woo Bee Leng* [1995] 1 MLJ 841 where at p 845, I pointed out the following:

> There is another stronger ground for me to affirm the decision of the trial court. It is this. Specific findings of fact were made by the trial court to following effect:
>
> > 'Oleh yang demikian saya memutuskan sebagai satu fakta bahawa pada masa kemalangan berlaku plaintif datang dari arah Jalan Sultan (dari atas ke bawah di dalam rajah kasar), tidak berhenti di simpang di mana ia patut berhenti lalu terus melanggar kereta defendan, di bahagian tepi kanan belakang. Oleh yang demikian saya memutuskan bahawa plaintif telah cuai di dalam menunggang motosikalnya.'
>
> The principles on which an appellate court may interfere with a lower court's findings of fact can be found in the passages in the judgment of Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* [1964] MLJ 97. His Lordship in that case said [at p 92]:
>
> > 'There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt (or Thomas) v Thomas* [1947] AC 484 at p 487; [1947] 1 All ER 582 at p 587:
> >
> > (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
> >
> > (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
> >
> > (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
>
> The trial court in the instant appeal did not, in the course of analysing the evidence, go against the principles enunciated by Lord Thankerton as stated above.

and factually that case was akin to the present appeal. There the trial court found that the rider of the motorcycle that came out of the minor road was solely liable and the appellate court refused to reverse or vary the findings of the trial court and forthwith dismissed the appeal with costs. The same would be true here. I too refused to reverse nor vary the findings of the trial court.

It was my judgment that the first appellate was wholly negligent and the respondent did not contribute nor share the responsibility of the blame.

Quantum

The respondent sustained the following injuries:

(1) acromio-clavicular dislocation;

(2) a closed comminuted fracture of the midshaft of the left femur; and

(3) scars;

and I will now undertake to examine these injuries separately.

The acromio-clavicular dislocation

Mr Ong Chee Yong took exception to this injury. It was his stand that this injury was not caused by the accident. At p 21A–B of AR, the trial court specifically said as follows:

> Oleh itu berdasarkan keterangan plaintif yang tidak dipertikaikan, malahan disokong oleh keterangan doktor-doktor SP2 dan SP3 serta laporan pakar mahkamah berpendapat plaintif sebenarnya telah mengalami kecederaan di bahu kiri akibat dari kemalangan yang berlaku dan patut di beri ganti rugi. Mahkamah berpendapat jumlah ganti rugi yang munasabah ialah RM8,000.

and clearly, therefore, the trial court believed the evidence of the doctors and concluded that the respondent had sustained the left shoulder injury as a result of the motor vehicle accident and computed the quantum at the reasonable rate of RM8,000. In the face of this overwhelming evidence, Mr Ong Chee Yong refused to give up. He said that the respondent did testify at p 20A of AR to the effect that as a result of the motor vehicle accident, the respondent sustained injury to his left shoulder. But he pointed out that it was not true that the respondent's evidence was not challenged. He then drew my attention to p 82D–E of AR, where the exchange under cross-examination showed that a challenge was mounted in regard to that left shoulder injury.

The specialists in the persons of Dr Ramachandran a/l Arumugam (SP1) and Dr Chiew Peng Cher (SD1) merely confirmed the existence of this injury at the time they examined the respondent. But the issue of the day, so submitted Mr Ong Chee Yong, was whether this injury was caused by the motor vehicle accident. It was submitted that the government doctors in the persons of Dr Lim Yang Kwang (SP2) and Dr Jamal bin Hamzah (SP3) did not state that this injury was caused by the motor vehicle accident.

Without a doubt, this injury was closely connected to the issue of loss of future earnings and a negative finding by this court would certainly affect the award for loss of future earnings. It was for this reason that Mr Ong Chee Yong argued vigorously to the effect that the award for this injury should not be made by this court.

The initial medical report by Dr Jamal bin Hamzah (SP3) as seen at p 133 of AR did not mention this injury. But I must at once say that there was ample evidence to show that the respondent had suffered this injury and that this injury was caused by the motor vehicle accident. I will now elaborate:

(a) The evidence of the respondent as seen at p 79F to p 80D of AR showed that the respondent sustained the left shoulder injury in the accident and that it was not caused by some other accident.

(b) Dr Ramachandran a/l Arumugam (SP1) testified at p 59D–E and at p 63C–D of AR and he confirmed that the respondent had the left shoulder injury. In his medical report as seen at p 149 to p 152 of AR, the good doctor said:

> Other pertinent abnormalities
>
> (1) Evidences of a total disruption of the left acromio-clavicular joint is present.
>
> (2) A prominent step is seen in the left shoulder.

(c) The evidence of Dr Lim Yang Kwang (SP2) to the effect that although there was no record of the injury in the initial examination at the time of admission, a further examination by another doctor and the x-rays taken confirmed that there was evidence of the acromio-clavicular disclocation. This piece of evidence can be seen at p 70C of AR. The good doctor too said that there was a possibility that the left shoulder injury had been overlooked in view of the more serious injury suffered by the respondent (see p 70D of AR).

(d) The evidence of Dr Jamal bin Hamzah (SP3) at p 73E to p 74C confirmed that according to the medical records of the respondent, there was a query in regard to the acromio-clavicular disclocation but the good doctor did not include this in the initial medical report prepared by him (see p 133 of AR). It must be emphasised that the said doctor testified that he did not examine the respondent at all and he prepared the medical report based on the medical records of the respondent.

I will now examine the evidence of the appellants' specialist by the name of Dr Chiew Peng Cher (SD1). The said doctor examined the respondent for the purpose of preparing a specialist report. In that report, the said doctor stated that there was evidence of a chronic disclocation of the left acromio-clavicular joint (see p 160 to p 163 of AR). In court, the said doctor testified that the nature of the injury was such that it would have been apparent at that time and that the doctors would have picked it up and flowing from this piece of evidence the suggestion made by the said doctor

was that this injury may not have been caused in the motor vehicle accident. In this regard, the opinion of the said doctor appeared to be at variance and way off tangent to that of Dr Ramachandran a/l Arumugam (SP1) at p 151 of AR and that of Dr Lim Yang Kwang (SP2) at p 70D of AR — these two doctors openly spoke of the possibility that this injury had been missed out. In a turn of event, Dr Chiew Peng Cher (SD1) conceded that the fracture of the femur sustained by the respondent was a far more serious injury as compared to the acromio-clavicular injury (see p 110D–F of AR). When questioned whether it was possible that the left shoulder injury to be missed out in the process of attending to the fracture of the femur — a more serious injury, Dr Chiew Peng Cher (SD1) was quite shrewd. He chose not to give a direct answer and proceeded to give a rather hypothetical answer regarding the medical care and attention given in the hospital and of the various standards and quality of the doctors in the hospital generally. Faced with this kind of situation, all the respondent had to do was to merely prove on the balance of probabilities that he had indeed sustained the acromio-clavicular injury in the motor vehicle accident and it was my judgment, on the evidence as found by the trial court, that the respondent had succeeded in this portfolio. Dr Chiew Peng Cher (SD1) was of the view that the injury was quite serious and he placed it at grade two to grade three (see p 103 of AR). A severe injury. And the good doctor said the same thing under cross-examination. The trial court had painstakingly considered this crucial point as can be seen at p 20 of AR and had arrived correctly at that conclusion as reflected at p 21A of AR and so I had no reason whatsoever to reverse the finding of the trial court on this point. Having said this, I certainly took into account that this injury — the acromio-clavicular injury, was not particularised in the statement of claim and parties certainly were said to be bound by their pleadings. But I venture to say that the object of pleadings would simply be to alert the other party of the case which he has to meet and to prevent surprise. On this score, it can hardly be said that the appellants were caught by surprise in respect of the left shoulder injury. From day one, the appellants knew of the respondent's claim under this head. I have to elaborate a little about this. The specialist report of Dr Ramachandran a/l Arumugam (SP1) dated October 12 1994 as seen at p 149 to p 152 of AR was served on the appellants' solicitors in good time. In response, the appellants' solicitors procured another specialist report from Dr Chiew Peng Cher (SD1) dated September 11 1995 as seen at p 159 to p 162 of AR and this injury was mentioned in that report. Before the trial court, the respondent took steps to prove this injury by calling three doctors to testify on his behalf, namely Dr Ramachandran a/l Arumugam (SP1), Dr Lim Yang Kwang (SP2) and Dr Jamal bin Hamzah (SP3). On the other side of the fence, the appellants spared no efforts at all to disprove the same. Yet the appellants did not raise any objection at the trial proper in regard to the injury under this head nor did the appellants raise an objection in regard to this issue in the memorandum of appeal as seen at pp 1 to 3 of AR. In the written submission of counsel for the appellants before the trial court as seen at p 42 of AR, not a single whimper of objection was raised in regard to the injury under this head. Somehow before me an objection was raised in regard to this injury and that appeared to be an

Without a doubt, this injury was closely connected to the issue of loss of future earnings and a negative finding by this court would certainly affect the award for loss of future earnings. It was for this reason that Mr Ong Chee Yong argued vigorously to the effect that the award for this injury should not be made by this court.

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only to refer to the decision of Arulanandom J in *Siti Aisha bte Ibrahim v Goh Cheng Hwai* [1982] 2 MLJ 124, where at the same page his Lordship remarked:

> This was contrary to her pleadings and it is settled law that a plaintiff is bound by his pleadings but in view of my other findings in this case I do not think it is necessary to lay too much emphasis on technicalities.
>
> Again contrary to her pleadings, in her police report the plaintiff/respondent admitted she was crossing the road.

and of particular importance would be the judgment of Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) who wrote the judgment for the Federal Court in the same case when the case went up on appeal and at p 125 of the report his Lordship in clear precise language said:

> On the other hand, counsel for the respondent argued that on the pleadings it was the appellant's case that at the time of the collision she was 'lawfully walking along the proper side of the road' whereas in her evidence she said she was walking across the road. It is the respondent's contention that the failure to abide by her pleadings was fatal and the appellant's claim must therefore be dismissed. The case of *Menah binti Sulong @ Minah binti Sulong @ Aminah bte Sulong v Lim Soo & Anor* [FC Civil Appeal No 36 of 1970] (unreported) is relied upon as authority that a decision should be in strict accordance with the pleadings. This is reflected in that part of the speech by Lord Radcliffe in *Esso Petroleum Co Ltd v Southport Corp* [1956] 2 WLR 81 at p 91 when he said:
>
> > 'if an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they have to play in our trial system'.

At p 126 of the same case, his Lordship Abdul Hamid FJ (who later rose to be the Lord President of the Supreme Court) aptly said:

> The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was 'lawfully walking along the proper side of the road,' in her evidence she clearly said that she was walking across the road. Moreover in her police report included in the Agreed Bundle of Documents (exh P1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.
>
> It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.
>
> On appeal the learned judge allowed the appeal but for different reasons. He appreciated that the plaintiff's evidence was contrary to her pleadings, but in view of other findings he did not think it necessary to lay too much emphasis on technicalities.
>
> In this court in the case of *KEP Mohamed Ali v KEP Mohamed Ismail* [1981] 2 MLJ 10 the learned Chief Justice Raja Azlan Shah delivering the judgment of the court at p 12 said:

> 'As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded.'

In another case *Playing Cards (M) Sdn Bhd v China Mutual Navigation Co Ltd* [1980] 2 MLJ 182 in this court, Abdoolcader J delivering the judgment of the court, said that 'although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered.'

We are of the view that in the circumstances of this case the learned President of the Sessions Court was entitled to consider the case having regard to the whole of the evidence and to decide it in a manner as was just between the parties.

The question to pose here would be: whether the appellants were misled, prejudiced, embarrassed or in any way caught by surprise or being led astray by the respondent's pleadings from the very beginning? In so far as the injury under this head was concerned — the acromio-clavicular dislocation, the answer would be in the negative for the reasons as stated by me earlier. This was my judgment and I so hold accordingly.

As a matter of interest, Edgar Joseph Jr J (who retired as a senior FCJ) after examining the relevant and pertinent authorities in *Rosita bte Baharom & Anor v Sabedin bin Salleh* [1992] 1 MLJ 379, succinctly said at p 389 of the report:

> There is thus a consistent current of judicial opinion for the proposition that a plaintiff in a running down case can depart from his pleadings at the hearing provided the defendant is not taken by surprise.

For these varied reasons, I would agree with the trial court that the respondent sustained, as a result of the motor vehicle accident, the acromio-clavicular dislocation and he was entitled to be compensated for this injury. The trial court using two comparables: (1) *Low Chee Siang & Anor v Wong Chong Pow & Anor* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1301 where Abu Mansor J (now FCJ) awarded RM8,000 for fracture of the clavicle (shoulder injury); and (2) *Ismail bin Haji Manap & Anor v Onn Swee Imm* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1309 where Wan Mohamed J awarded RM7,000 for fracture of the right clavicle; proceeded to award the respondent RM8,000 for the injury under this head. Mr Ong Chee Yong took exception and he argued that these two comparables, referring to *Low Chee Siang & Anor v Wong Chong Pow & Anor* and *Ismail bin Haji Manap & Anor v Onn Swee Imm*, were authorities for fracture of clavicle whereas the respondent sustained acromio-clavicular dislocation. So Mr Ong Chee Yong dutifully cited two authorities for acromio-clavicular dislocation:

(1) *Ungku Abdul Jalil bin Abdullah v Alexander Philip Kamanthra* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1390 where the deputy registrar of Singapore awarded S$3,500 for the right acromio-clavicular joint dislocation.

(2) *Chellappan Chivadasan v Wee Poh Construction Co (Pte) Ltd* [1989] 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1397 at p 425 where the magistrate of Singapore awarded S$4,500 for dislocation of the right acromio-clavicular joint resulting in slight right deltoid atrophy and slight deformity.

and he submitted that the respondent should be awarded RM4,000 for his acromio-clavicular dislocation.

Mr S Gunasegeran, always quick on the uptake, rightly pointed out that this court was not bound to accept nor follow the two authorities from Singapore as they were from a subordinate and inferior courts of a foreign country. They were not binding precedents. I need to add that even if this court were to accept the two authorities from Singapore, the exchange rate would give a higher quantum to the respondent for his acromio-clavicular disclocation. At the time of writing this judgment, the exchange rate, of which judicial notice can be taken, of Malaysian ringgit to that of Singapore dollar would be on the basis of S$1 equivalent to RM2.2650. Calculation wise S$3,500 would be equivalent to RM7,927.50 while S$4,500 would be equivalent to RM10,192.50 and these calculations would be activated if the Singapore authorities were to be adopted by this court. Calculation wise too the award by the trial court of RM8,000 for this injury when converted to Singapore dollars would give a figure of S$3,532 only. If Mr Ong Chee Yong wanted this court to apply *Chellapan Chivadasan v Wee Poh Construction Co (Pte) Ltd*, then the award to the respondent computed in Malaysian ringgit would be RM10,192.50 bearing in mind that *Chellapan Chivadasan* was a 1989 case whereas we are now in the year 1999 — a difference of 10 solid years. To me, awards should keep up with the times (*Phuah Jee Suan v Nila Vasu Pillai* [1973] 1 MLJ 186, 188 (CA); *Wong Tin Vui v Patrick Midok & Anor* [1975] 2 MLJ 260; *Lee Yew Hoe v Lee Bock Huat* [1980] 2 MLJ 271 and *Liong Thoo v Sawiyah & Ors* [1982] 1 MLJ 286).

Should I increase the award of RM8,000 to more than RM10,192.50 for the acromio-clavicular dislocation in favour of the respondent notwithstanding that there was no cross-appeal by the respondent against the quantum as handed down by the trial court. The appellants had by their notice of appeal at p 10 of AR appealed against the whole decision of the trial court and I take this to mean an appeal against both the liability and quantum. But why did Mr Ong Chee Yong in urging this court to reduce the award for the acromio-clavicular dislocation to RM4,000 cite those two Singapore authorities? Was he urging this court to apply the two Singapore authorities vigorously and increased the quantum for this injury in favour of the respondent? Surely this court, as an appellate court, in its discretion can review the whole case even through there was no cross-appeal by the respondent in regard to the quantum. In *Lee You Suen v Liew Lok & Ors* [1967] 2 MLJ 60 (FC), Ong Hock Thye FJ was of the view that the court could review the evidence on appeal. That was a case where the representative of the deceased driver did not cross-appeal and the Federal Court in that case held that the effect of 'these appeals, of course, is to

reopen the question of liability so as to leave it entirely at large'. The Federal Court then set aside the order of the High Court judge in Ipoh and the award of damages was made solely against the appellant. Then there is the case of *Thevannasan & Anor v Pang Cheong Yow & Ors* [1973] 1 MLJ 254, a decision of the Federal Court where Ali FJ and Gill FJ held that an appeal to the Federal Court was by way of rehearing. It must be emphasised that in *Thevannasan & Anor v Pang Cheong Yow*, both the appellants and the third respondent have respectively appealed and cross-appealed against the trial court's findings on liability and its apportionment.

Being a severe injury, I would increase the quantum from RM8,000 as awarded by the trial court to RM20,000 in view of our weak ringgit as compared to the Singapore dollar and that would be the award for the acromio-clavicular dislocation. That was my judgment and I so hold accordingly.

A closed comminuted fracture of the midshaft of the left femur

Dr Ramachandran a/l Arumugam (SP1) in his medical report on the respondent at p 149 to p 152 of AR listed this injury which was the result of the road traffic accident. The good doctor listed the respondent's present complaints as (the relevant ones only):

(1) That he walks with a limp.
(2) Difficulty in climbing stairs and ladders.
(3) Limitation of left knee movements.
(4) Inability to squat for long periods.
(5) Inability to sit cross-legged for prayers.
(6) Inability to lift heavy objects.
(7) Inability to run.
(8) Pain in the left thigh in cool conditions.

In regard to the lower limbs of the respondent, the good doctor too listed three items:

(1) The left thigh muscles are wasted by 4 cm.
(2) The left calf muscles are wasted by 0.5 cm.
(3) The left lower limb is shortened by 1 cm.

The x-ray findings were listed by the same doctor as:

1 Left Femur:

There are evidences of a fracture of the midshaft of the left femur which has been internally fixed with an intramedullary nail and a wire. The fracture has united well.

The respondent too had muscle wasting, and the said doctor had this to say in his medical report:

A 2 Muscle Wasting:

This man has a very severe degree of wasting of the left quadriceps muscle and a mild wasting of the left calf muscles. Muscle wasting after sustaining fractures is generally due to disuse.

More than two years have lapsed since he sustained the fracture. Muscle wasting is therefore liable to remain a permanent disability.

B

The respondent too would suffer pain in cool conditions and this was what the said doctor said:

5 Pain In Cool Conditions:

Pain in injured parts of the musculoskeletal conditions in cool conditions
C is a common complaint which is liable to remain permanent.

Finally, Dr Ramachandran a/l Arumugam (SP1) in so far as this injury was concerned concluded that:

The nail in the left femur may be removed now. After removal of the nail the range of movements in the left hip would improve but it is unlikely that a full
D recovery of the left hip movements would come about.

The cost or removing the nail is about RM1,000.

Dr Chiew Peng Cher (SD1) also prepared a medical report on the respondent as seen at pp 159 to 163 of AR and this was what he said:

E 1 Comminuted fracture left femur.

The fracture left femur was intramedullary nailed on the 7.5.92 at Hospital Sultanah Aminah, Johor Bahru.

and he further noted that the respondent had partial permanent disability by the shortening of his left lower limb. The prognosis advanced by the said
F doctor were (the relevant ones only):

1 The comminuted fracture right femur has united well.
The K-nail can be removed anytime now.
The shortening of 0.5 cm is permanent.

2 The range of movements of his left hip and left knee joint are full and free.
G The pain felt in the left thigh is due to muscle scaring.

Dr Jamal bin Hamzah (SP3) in his initial injury report of the respondent at p 133 of AR gave a short report and his report was worded thus:

The above named alleged MVA on 28 April 1992 and sustained closed comminuted fracture left midshaft femur.
H

Intramedullary nailing of left femur done on 3 May 1992.

He was discharged on 7 May 1992 after stable with crutches.

He was subsequently followed-up in the clinic and discharged on 28 November 1992.

I In short, under this head, the injury which the respondent sustained resulted in a one cm shortening, muscle wasting which was liable to remain a permanent disability, limp and residual disabilities. But Mr Ong Chee

Yong was clearly not satisfied with the award of RM25,000 for this injury which the trial court awarded. He submitted that the trial court made an excessively high award for this injury and that there was a failure to consider or properly consider the evidence of the specialist in the person of Dr Chiew Peng Cher (SD1). He stressed that Dr Ramachandran a/l Arumugam (SP1) examined the respondent on October 4 1994 while Dr Chiew Peng Cher (SD1) examined the respondent on July 14 1995 — some nine months later. He emphasised that the trial court referred to both the medical reports and then summarised the injuries after purportedly perusing through these two medical reports. Tacitly it showed, so the submission went, that the trial court accepted both these two medical reports and gave the impression of balance and fairness. But in reality, it was argued that the trial court largely or completely failed to consider the specialist report of Dr Chiew Peng Cher (SD1). It was also submitted that the trial court made a token reference to Dr Chiew Peng Cher's medical report and in so doing the trial court was said to be giving 'lip service' to that report only.

It was said that there was a sharp contrast in opinion between Dr Ramachandran a/l Arumugam (SP1) and that of Dr Chiew Peng Cher (SD1). The former spoke of restriction of left hip movement by about 25% with limitation in the hip movements and the limitation of flexion to the left knee was said to be permanent. Whereas Dr Chiew Peng Cher (SD1) in his medical report at p 163 of AR said, inter alia, that the respondent should be able to resume his old job as a construction labourer. My attention was drawn to the passages in the judgment of the trial court that were said to be extremely disturbing, particularly at p 18D of AR:

> Kedua-dua pakar berpendapat kesemua kecacatan ini adalah kekal walaupun terdapat sedikit perbezaan pendapat mengenai darjah pemulihan.

It was baffling, so submitted Mr Ong Chee Yong, that the trial court had come to that opinion as Dr Chiew Peng Cher (SD1) in his medical report had clearly said that the range of movements of the left hip and left knee joint were full and free and that the respondent should be able to resume his old job as a construction labourer.

An attack was advanced in regard to the evidence of Dr Ramachandran a/l Arumugam (SP1) and his evidence under cross-examination at p 64 of AR was highlighted when he said:

> With removal of the nail the muscle wasting will be eliminated.

but this piece of evidence was said to run counter to the medical report of Dr Ramachandran a/l Arumugam himself when he alluded to the severe degree of wasting of the left quadriceps muscle.

I have perused through the judgment of the trial court and it was clear that the trial court had considered the relevant comparables and the medical reports of the doctors before arriving at the figure of RM25,000 as an award for this injury. No doubt it was not a very thorough judgment as Mr Ong Chee Yong expected it to be, but, in my judgment, it was a '*speaking judgment*' that covered the pertinent points advanced by the parties thereto. I have no quarrel with the judgment of the trial court.

A In *Balakrishnan v Savastine Anthony & Anor* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1199 at p 354, Abdul Malek Ahmad J (now FCJ) awarded RM20,000 for the fracture shaft of right femur with 4 cm shortening resulting in a permanent limp. But there was no wasting of the muscles.

B In *Inderjeet Singh a/l Piara Singh v Mazlan bin Jasman & Ors* [1995] 2 MLJ 646, James Foong J awarded RM12,000 for the fracture of the femur where an operation was done to fix plating and a further operation required to remove the plating.

In *Low You Choy & Anor v Chan Mun Kit & Anor* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1125 at p 313 Wan Mohamed J awarded
C RM14,000 for the fracture of the right femur.

In *Lee Eng Beng & Anor v Torairajah & Ors* [1987] 1 MLJ 121 (SC), Syed Agil Barakbah SCJ awarded RM31,500 for fracture of the right femur which on x-ray showed comminuted fracture of the lower third right femur thereby confirming the award of the High Court judge. Incidentally, it
D would be pertinent to point out that the High Court judge gave a global award of RM35,000 for all the injuries and after deducting 10% for overlapping, awarded RM31,500.

In *Victor Alphonse Sebastian & Ors v Lee Ah Leek* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1056 at p 293, Mustapha Hussain J awarded
E RM33,000 for fracture of the right midshaft femur.

Now, the trial court awarded RM25,000 for this injury. Mr Ong Chee Yong suggested a figure of RM15,000 based on a 100% basis. Mr S Gunasegaran submitted that the award of the trial court cannot by any standard be said to be generous and that there were no reasons at all for this court to vary it. To me, the sum of RM25,000 was not generous nor
F was it manifestly excessive. In 1987, the courts have awarded higher sums for an injury of this nature — between RM31,500 to RM33,000. The award of the trial court was certainly too low bearing in mind that this court must keep up with the times. As I said, the respondent did not file a cross-appeal in regard to the quantum but based on the authorities alluded to earlier, I
G have a discretion to vary the award under this head. A more realistic figure and in attempting to keep up with the times, the award for the closed comminuted fracture of the midshaft of the left femur with wasting of the muscles must be varied from RM25,000 to RM35,000. This was my judgment and I so ordered accordingly.

H *Scars*

Without a doubt, the respondent sustained scars as a result of the motor vehicle accident. Dr Ramachandran a/l Arumugam (SP1) in his medical report at p 149 of AR described the scars in these words:

I 1 A 20cm long hypopigmented operative scar on the outer aspect of the left thigh.

2 A 3 cm long hypopigmented operative scar on the left buttock.

The good doctor explained in his medical report that the operative scars on the left thigh and buttock would remain permanent blemishes on the skin. There were also muscle scarrings which caused the joint movements to be limited.

Dr Chiew Peng Cher (SD1) in his medical report adverted to the posterior lateral scar measuring 20 cm to the left buttock. The good doctor too said that the pain that was felt in the left thigh was due to muscle scarring.

The trial court at p 19E–F of AR considered the nature and effect of these scars and awarded the sum of RM5,000 for this injury.

On the relevant comparables, I need to cite a few of them.

In *Tan See Teng v Lim Kwee Hwee* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1136 at p 320, the Singapore High Court registrar awarded S$3,000 for multiple scars. On appeal, Chan Sek Keong J varied the award and gave S$1,000.

In *Low You Choy & Anor v Chan Mun Kit & Anor*, Wan Mohamed J for:

(a) 14cm x 0.5cm scar on right thigh; and

(b) 4cm x 0.2cm scar on right buttock,

awarded RM4,000.

In *Wong Yee Cheong & Anor v Toh Seng Chuan* [1988] 2 MLJ xxx, Eusoff Chin J (now Chief Justice of Malaysia) awarded RM8,500 for multiple scars on frontal region (16 cm and 4 cm), the abdomen and pelvis (6cm and 9cm) and the right leg (20 cm, 10cm x 10 cm, 15 cm, 2 cm x 10 cm).

In *Seow Gek Soo alias Yeo Gek Soo the administratrix of the Estate of Ee Pinn Ian, deceased v Chia Mun Fook* [1989] 1 CLJ 985, Abdul Malek Ahmad J (now FCJ) awarded RM7,000 for closed comminuted fracture of right humerus with slight lateral curvature and deformity with restriction of shoulder movement.

In *Lee Wee Yee & Anor v Koh Geok Chee & Ors* 6 *Mallal's Digest* (4th Ed, 1997 Reissue) para 1188, Karthigesu J of Singapore High Court awarded S$7,000 for multiple scars of the right lower limb.

Mr Ong Chee Yong submitted that RM3,500 should be sufficient for the scars sustained by the respondent. Mr S Gunasegaran argued that the sum of RM5,000 as awarded by the trial court for the scars was sufficient.

Now, the question to pose as was posed by Lamin PCA in *Ang Lit Yiang & Ors v Teoh Hing Yeu & Anor* was whether there was a failure of justice if this court did not interfere with the quantum of RM5,000 as awarded by the trial court for the scars notwithstanding the fact that there was no cross-appeal by the respondent. The latest decision for multiple scars of the right lower limb came from the High Court of Singapore where Karthigesu J awarded S$7,000 (*Lee Wee Yee & Anor v Koh Geok Chee & Ors*) and applying the exchange rate of S$1 equals to RM2.2650, the figure of S$7,000 would give a hefty sum in Malaysian Ringgit of RM15,855. That

would be a more realistic and reasonable figure bearing in mind that even Dr Chiew Peng Cher (SD1) in his medical report acknowledged that pain would be felt in the left thigh due to muscle scarrings. Dr Ramachandran a/l Arumugam (SP1) also acknowledged that the joint movements were restricted due to the muscle scarrings. It must be borne in mind that an appeal to an appellate court would always be by way of a rehearing. Under cross-examination, Dr Ramachandran a/l Arumugam (SP1) also adverted to the muscle scarrings at p 64 of AR. Under cross-examination, Dr Chiew Peng Cher (SD1) was shown the medical report of Dr Ramachandran a/l Arumugam (SP1) and he (Dr Chiew) agreed that there were scars on the left thigh and buttock. Old comparables must be adopted vigorously but subject to this caveat. There must be a commensurate increase when the difference between the comparable relied upon was decided some seven or ten years ago. This is the only course of action to take in order to do justice to the respondent — the innocent motor vehicle accident victim. An award of RM15,800 (a round figure) would be reasonable and fair for the scars sustained by the respondent and I so ordered accordingly.

Observation

The awards for these injuries were substantially increased by me notwithstanding the fact that the respondent did not cross-appeal in regard to the quantums as quantified by the trial court. If the then Federal Court in *Lee You Suen v Liew Lok & Ors* was minded to say that the appeals would re-open the question of liability so as to leave it entirely at large and the then Federal Court then set aside the order of the High Court judge and the award of damages was then made solely against the appellant, so can I sitting in an appellate capacity do the same thing in the present appeal. In the present appeal, the appellants challenged the liability and quantum that was arrived at by the trial court. This by itself re-opened the questions of liability and quantum at large for me to re-open the pandora box, so to speak, and act according to the justice of the case. I have done just that and in so doing I was not breaking new ground. It was an old ground which was not well trodden.

The time has come for the courts to be magnanimous in its awards for running down cases. Old comparables must continue to be used but the quantums must rise and be commensurate with the times. The weak Malaysian ringgit and the ever increasing cost of living serve as useful guidelines to increase awards to the litigants in running down cases. In the past, loss of life and limb as a result of a road accident receive minimal attention by the courts and the quantums have all along been minimal. This must change. The winds of change are here to stay. Battered and injured limbs arising out of road accidents can only be redressed by way of monetary compensation. The reputation, dignity and honour of individuals by way of defamation suits have lately sprouted up in the courts. The quantums for defamation suits sought by the litigants have sky rocketed. Colossal sums have been sought for in defamation suits. Defamation is said to be the publication of a statement which reflects on a person's reputation

and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him. No one wants to be defamed. And no one wants to be injured as a result of a road accident. Loss of life and limb are equally serious and in terms of hierarchy should be placed on the same level as defamation suits. A disparaging statement of a person that affects that person's reputation in relation to his office, profession, calling, trade or business may be defamatory. It all depends on the available evidence (*Mount Cook Group v Johnstone Motors Ltd* [1990] 2 NZLR 488; *Turner v MGM Pictures Ltd* [1950] 1 All ER 449; *Angell v HH Bushell & Co Ltd* [1968] 1 QB 813; and *Drummond-Jackson v British Medical Association* [1970] 1 WLR 688). Using defamatory suits as an analogy, I have no hesitation to increase the awards of the trial court even though the respondent did not cross-appeal against the quantums handed down by the trial court.

Reverting back to the judicial notice which was taken in regard to the difference between our Malaysian ringgit and the Singapore dollar, I can say with confidence that it is a matter of common knowledge to the people in Johor Bahru that the Singapore dollar is stronger than our Malaysian ringgit and no inquiry is needed to ascertain this fact. I too act on my own knowledge in regard to the currency disparity between our Malaysian ringgit and the Singapore dollar. Lord Denning once said in *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] AC 663 at p 691:

> The court must possess itself of whatever information is necessary for the purpose. Some judges may have it already because of their previous experience. Others may have to acquire it for the first time, but in either case the information they glean is not evidence strictly so called. When an assessor explains the technicalities, he does not do it on oath, nor can he be cross-examined. And no one ever called the author of a dictionary to give evidence. All that happens is that the court is equipping itself for its task by taking judicial notice of all such things as it ought to know in order to do its work properly.

and my previous experience tells me that the Singapore dollar is stronger than our Malaysian ringgit and it is with this in mind that the authorities from Singapore when applied to the Malaysian context, a commensurate increase in the quantum must invariably be given. After all judicial notice is normally taken of the current practice at a particular time. When taking judicial notice a judge frequently makes use of his general knowledge, and judges can certainly make use of their knowledge of local conditions (*Ingram v Percival* [1969] 1 QB 548, [1968] 3 All ER 657 (the movements of tidal wave); *Kent v Stamps* [1982] RTR 273 (topography of a particular road); and *Paul v DPP* (1990) 90 Cr App Rep 173 (the residential character of a particular area)). I have been a patient of the physiotherapy ward of the Sultanah Aminah General Hospital in Johor Bahru where the physiotherapist attended to my sprained left thigh as a result of excessive jogging. Remedial exercises recommended by the physiotherapist proved to be beneficial and I too saw victims of road accidents being attended to by physiotherapists. The physiotherapy wards are full of victims of road accidents who are undergoing a variety of treatments ranging from massage

to infra-red heat treatment. The physiotherapists nursed the injured limbs to health, so to speak. The injuries sustained by the respondent must have been painful and since the respondent had a 1cm shortening of his left leg, a muscle wasting which might turn out to be a permanent disability, a limp and other residual disabilities, I can certainly take judicial notice that the physiotherapist must have a tough time healing those injuries back to normal with the cooperation of the respondent. The scope and ambit of judicial notice can never be closed. I don't think that I have gone too far in making use of my personal knowledge of the happenings in the physiotherapy wards to the present appeal. Different judges may have different approaches and this is what is termed as judicial thinking. Lord Greene once said in *Reynolds v Llanelly Associated Tinplate Co Ltd (Court of Appeal)* [1948] 1 All ER 140 at p 142:

> The practice of county court judges of supplementing evidence by having recourse to their own local knowledge and experience has been criticised, praised as most beneficial, objected to, and encouraged in different decisions.

I venture to add that even without applying my personal knowledge of the happenings in the physiotherapy wards, the awards for the injuries sustained by the respondent must be increased to keep up with the times. Even the cost of living in good old Johor Bahru has gone up. It is pertinent to point out that in *Re Richardson* [1920] SASR 25, a South Australian court has taken judicial notice of a general and overall increase in the cost of living.

Cost of future surgery

The parties agreed to the award made by the trial court at RM1,000. The cost of future surgery must be in relation to the removal of the nail which was alluded to by Dr Ramachandran a/l Arumugam (SP1) in his medical report at p 152 of AR and the good doctor quantified it at RM1,000. I confirmed the award of the trial court under this head.

Loss of earnings

It forms part of the general damages and there was no necessity to plead it (*Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 (FC)). But evidence must be led in that direction. However, it would be prudent to plead it so that the opposite party would not be caught by surprise. Loss of earnings can be classified into:

(1) pre-trial loss; and

(2) post-trial loss.

Pre-trial loss is further classified into total pre-trial loss and partial pre-trial loss.

Pre-trial loss or actual loss of earnings

Gill FJ in *Yeoh Cheng Han v Official Administrator, Malaya* [1972] 2 MLJ 7 (FC) at p 10, boldly held that loss of earnings up to the date of the trial of the action be categorised as special damages. In *Mahmod bin Kailan v Goh*

Seng Choon & Anor [1976] 2 MLJ 239 at p 240 (FC), Suffian LP awarded a sum of money as loss of income per month and his Lordship then multiplied it by the number of months the plaintiff did not work from the date of accident to the date of trial and called it actual total loss of earnings, while Lee Hun Hoe CJ Borneo and Ali FJ concurred. The very same principle was vigorously applied in *Thangavelu s/o Chinnasamy v Chia Kok Bin* [1981] 2 MLJ 277. In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71 at p 74, the court there boldly held that although a lesser number of months had been pleaded for pre-trial actual loss of earnings, yet the court could on its own volition disregard the pleaded number of months and forthwith award for greater number of months provided there was supportive evidence in that direction.

Post-trial or future loss of earnings

The usual practice of the courts would be to work out the assessment for future loss of earnings on the actuarial tables. But the court in *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 arrived at a fair multiplier without referring to the actuarial tables and the court simply applied the direct multiplier method. The Supreme Court in *Ahmad Nordin bin Hj Maslan & Anor v Eng Ngak Hua & Ors* [1985] 2 MLJ 431 (SC) opted for the use of the actuary tables rather than apply the direct calculation.

Arguments and the evidence

In grounds four and five of the memorandum of appeal the appellants contended that trial court had erred in failing to deduct the sum of RM100 being the living expenses in awarding the pre-trial loss of earnings and in allowing 12 months for loss of earnings.

The respondent testified that he was working as a house builder and was earning RM45 a day and that he usually worked for 26 days in a month, thereby giving an average of RM1,170 as his monthly income (see p 78C of AR). The trial court assessed the respondent's income at RM30 per day thereby yielding a total of RM878 per month. This was about RM292 less than the amount stated by the respondent. So, Mr S Gunasegaran argued that although the trial court did not expressly say in the judgment, yet it can be presumed that in assessing the net income of the respondent the trial court had taken all the relevant factors including living expenses into consideration. Mr Ong Chee Yong argued that a sum of RM150 ought to be deducted as living expenses and he suggested that the proper multiplicand for total loss of earnings should be in this fashion: RM780 – RM150 = RM630. I am constrained to say that in assessing damages for loss of earnings, a deduction for living expenses of the respondent should be made (*Chang Chong Foo & Anor v Shivanathan* [1992] 2 MLJ 473 (SC)). In cross-examination, the respondent was asked as seen at p 89A of AR:

Soalan: Pada masa sebelum kemalangan, berapakah perbelanjaan awak bersabit kerja awak?

Jawapan: Lebih kurang RM150 sebulan.

Under re-examination, the respondent said as seen at p 89C to D of AR:

> Soalan: Apakah perbelanjaan RM150 itu?
>
> Jawapan: Untuk belanja makan di tempat kerja dan belanja petrol.
>
> Soalan: Lepas awak balik bekerja adakah awak membelanja yang sama untuk petrol?
>
> Jawapan: Sekarang saya menumpang orang ke tempat kerja. Saya membayar RM30 sebulan. Sekarang saya membelanjakan sebanyak RM50 sebulan untuk makan.

The respondent testified in examination-in-chief that he could not work for one year after the accident (see p 78C–D of AR) and under cross-examination the respondent said the same thing (see p 84C of AR). The appellants' specialist by the name of Dr Chiew Peng Cher (SD1) in examination-in-chief testified that the period of disability for the respondent would be about three to six months (p 105F and p 106A to B of AR). But under cross-examination, Dr Chiew Peng Cher (SD1) relented and he admitted that although the recovery period was about six months, it was possible that it would take up to one year (at p 112D–E of AR). Thus, the trial court acting on the available evidence was of the view that 12 months was a reasonable period of time for recovery (at p 23B–C of AR). But the statement of claim at p 31 of AR stated that the respondent merely claimed for 11 months and the respondent did not act swiftly to amend the statement of claim so that it will flow with the evidence that was adduced. With this impediment in mind, Mr S Gunasegaran had no choice but asked this court to adopt the multiplier of 11 months. It must be borne in mind that special damages in contrast to general damages have to be specifically pleaded and proved (*Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324, 327 (FC)). That being the case, I have to apply the multiplier at 11 months.

In regard to ground six of the memorandum of appeal, it was contended on behalf of the appellants that the trial court had erred in awarding pre-trial partial loss of earnings at RM390 per month until the date of the trial. It was also argued purportedly on the evidence of Dr Chiew Peng Cher (SD1) that no award should be made under this head. Alternatively, it was argued that the award of RM390 per month was contrary to the statement of claim where the amount claimed was stipulated at RM300 per month. Mr S Gunasegaran argued that despite the rantings and the ravings of Mr Ong Chee Yong there was ample evidence to show that the respondent had suffered a partial loss of earnings as a result of the injuries suffered in the accident. I totally agree with Mr S Gunasegaran and I will now elaborate:

(1) At p 78E to p 79D of AR, the respondent testified that after the accident he could not work as well as before and that his former employer refused to re-employ him. In order to mitigate his loss, the respondent accepted a lighter job with another employer and was given a reduced salary. The respondent testified that he was now unable to climb height and work at a higher elevation. He said he was now paid RM15 per day compared to RM45 a day previously. There was thus a net loss of RM30 per day amounting to RM780 per month, to be exact for 26 days only.

(2) The evidence of the respondent's previous employer by the name of Mokhtar Apandi bin Abdul Ghani (SP6) at pp 94C and 94F of AR showed that he was unable to re-employ the respondent after the accident because the disabilities suffered by the respondent have rendered the respondent unsuitable for the job. Mokhtar Apandi bin Abdul Ghani (SP6) too testified that the respondent was unable to engage himself in certain aspects of house building and this can clearly be seen at pp 96A, 97D and 98C–D of AR.

(3) There was evidence emanating from Mokhtar Apandi bin Abdul Ghani (SP6) to the effect that the respondent was now being given lighter duties (p 99B of AR) and SP6 held the view that the respondent was unable to do heavy job (p 99D of AR and pp 100B and 100E–F of AR).

(4) In his medical report, Dr Ramachandran a/l Arumugam (SP1) at p 152 of AR expressed his opinion that the respondent would have difficulty in working as a house builder and the good doctor held onto the same view when he testified before the trial court on the same point (at p 60B to E of AR).

(5) Under cross-examination, Dr Chiew Peng Cher (SD1) conceded that he was really in no position to comment on how the respondent would actually perform at the work site and in the circumstances the good doctor was willing to take the respondent's word for it (p 113A to D of AR).

Mr S Gunasegaran was quite magnanimous when he conceded that the pre-trial partial loss of earnings would be reduced from RM390 per month to RM300 per month.

In regard to the multiplier, the respondent was born on 8 October 1960 (p 79E of AR), while the date of the accident was on 27 April 1992 and that made the respondent 31 years of age at the time he was injured. Section 28A(2)(d)(ii) of the Civil Law Act 1956 enacts that in assessing damages for loss of future earnings the court shall take into account that in the case of any other person who was of the age range extending between 31 years and 54 years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2. Calculation wise using the figure of 55 minus 31, it gives a figure of 24 and this is to be divided by the figure 2. Thus, it would be 24 divided by 2 becomes12 years, and that would be the multiplier.

Pre-trial loss or actual loss of earnings

The evidence showed that the appellant was earning RM45 per day for 26 days before the accident and the total sum came to RM1,170 (RM45 x 26 days = RM1,170). From this sum, the living expenses of the respondent amounting to RM150 per month must be deducted and after deduction the figure arrived at would be RM1,020 (RM1,170 minus RM150 equals RM1,020). In the statement of claim as opposed to the evidence, the

respondent adopted a multiplier of 11 months. In the evidence, the multiplier was 12 months and I agreed with Mr Ong Chee Yong that this court must follow the statement of claim to quantify the award. Thus, taking into account 11 months wherein the respondent was left unemployed, the calculation would be as follows: RM1,020 times 11 months equals RM11,220 and this was the award which the respondent was entitled to and I so awarded him accordingly.

Pre-trial partial loss of earnings

In the statement of claim, the respondent claimed for a sum of RM300 per month for eight months beginning from March 1993 to October 1993 thereby giving a sum of RM2,400 on the basis of the following calculation: RM300 times eight months equals RM2,400. The trial court assessed it at RM390 per month and since Mr S Gunasegaran magnanimously conceded that the multiplier should be RM300 per month, it was accordingly acceded to by this court. Under this head, the award would be RM2,400.

Post-trial loss of earnings or future of loss earnings

In assessing damages for loss of future earnings under this head, I shall certainly take into account the age of the respondent at the time he was injured (s 28A (d)(ii) of the Civil Law Act 1956). On the date of the accident, the respondent was 31 years of age and so the number of years' purchase shall be 12. As I said, 11 months after the accident the respondent started work and he was paid RM15 per day, a far cry from the amount which he used to get before the accident. Since the respondent could only work for 26 days in a month, the calculation would be as follows: RM15 per day x 26 days = RM390 per month. Before the accident, the respondent was earning RM1,020 per month and using this figure as a base minusing it with the figure of RM390, it would give a sum of RM630 per month as the loss that the respondent would incur. Calculation wise it would be as follows: RM1,020 minus RM390 equals RM630 loss for a month. Since s 28A (2)(d)(ii) of the Civil Law Act 1956 sets out the formula to arrive at the appropriate multiplier for victims above 31 years of age but below 54 years and as calculated earlier on it was computed at 12 years. In the circumstances, this court would award the respondent for post-trial loss or future loss of earnings as follows: RM630 per month x 12 months x 12 years purchase = RM90,720, and this would be the sums the respondent was entitled to and so it shall be.

Special damages

This was agreed by the parties and the trial court awarded RM445 and I so confirmed accordingly.

To summarise, after painstakingly perusing through the appeal record (AR) and the documentary evidence together with the submissions of the parties, I made the following orders:

Liability

The first appellant was totally responsible for the accident and he was the sole tortfeasor. The respondent did not contribute to the accident at all.

Quantum

(1) *The acromio-clavicular dislocation*

The respondent was awarded RM20,000 by this court as compared to the trial court who merely awarded RM8,000.

(2) *A closed comminuted fracture of the midshaft of the left femur*

I awarded RM35,000 to the respondent for this injury and in so doing I varied the award of the trial court who merely awarded RM25,000.

(3) *Scars*

A sum of RM15,800 was awarded to the respondent for this injury by me. The trial court merely awarded RM5,000 and it was a mere pittance and there was thus a pressing need to vary it.

(4) *Cost of future surgery*

The respondent was awarded by the trial court under this head at RM1,000 and I confirmed this award accordingly.

(5) *Pre-trial loss or actual loss of earnings*

I awarded the respondent RM11,220 while the trial court awarded the sum of RM9,360. That being the case, the award by the trial court was varied accordingly.

(6) *Pre-trial partial loss of earnings*

I awarded RM2,400 to the respondent in line with the statement of claim. The trial court awarded RM14,820 under this head and I varied it accordingly.

(7) *Post-trial loss of earnings or future loss of earnings*

A sum of RM90,720 was awarded to the respondent under this head. This sum certainly made the award by the trial court at RM28,200 as mere pittance. I too varied the award by the trial court under this head.

(8) *Special damages*

A sum of RM445 was awarded to the respondent.

Interest

In my judgment, the general damages should carry interest at the rate of 8% per annum from the date of the service of the writ till the date of judgment whereas all special damages carried interest at 4% per annum from the date of accident to the date of judgment. It goes without saying that no interest shall accrue for loss of future earnings. Furthermore, there shall be interest at the rate of 8% per annum on the whole judgment sum from the date of

judgment till the date of payment as provided for under O 42 r 12 of the Rules of the High Court 1980. Costs must be taxed and it should go to the respondent (*Ng Aik Kian & Anor v Sia Loh Sia* [1997] 2 AMR 1996).

Addendum

I have varied the awards of the trial court as I was convinced that the trial court had acted on a wrong principle of law. To me, in increasing the awards, I was of the view that the awards were so small as to make it an erroneous estimate of the damages to which the respondent was, in law, entitled to. As Azmi CJ (Malaya) once said in *Topaiwah v Salleh* [1968] 1 MLJ 284 at p 285:

> The difficulty of laying down the principles on which damages are awarded has frequently been recognized. However, as Lindley LJ in *Rodocanachi v Mibburn Brothers* [1887], 18 QBD 67, 78 stated:
>
> > 'It must be remembered that the rules as to damages can in a nature of things only be approximately just, and that they have to be worked out, not by mathematicians, but by juries,'
>
> Or another way of putting it — that it is a matter of assessment but not of calculation. So far as this court is concerned we should, to paraphrase Greer LJ in *Flint v Levell* [1935] 1 KB 354, 360 be disinclined to reverse the finding of a trial judge as to the amount of damages merely because we think that if we had tried the case in the first instance we would have given a lesser sum. To justify reversing him, we should be convinced that he acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damage. The assessments which the courts have made over the years form some guide to the kind of figure which is proper and which the appellate court will follow in the light of the special facts of each particular case.

and without a doubt, the special facts of the present appeal warranted the awards to be increased.

In *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 (FC), Gill FJ remarked at p 238 of the report:

> As has been said again and again, the assessment of damages in cases of personal injury is one of the most difficult things for either a judge in the first instance or a Court of Appeal. When a man has lost his arm there is no sum in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered. It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amounts awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide. The general principle is that an appellate court can only interfere with an assessment if it is considered so inordinately low or inordinately high as to make the court exclaim, 'Good gracious, is that the sum which has been awarded — that sum must be altered', or if it is so much out of line with the discernible trend or pattern of awards in reasonably comparable cases that it must be regarded as a wholly erroneous estimate.

and, without a doubt, I too exclaimed the same thing when I saw the awards of the trial court were so inordinately low and so I altered it accordingly. This was my judgment and I so ordered accordingly.

Oral application for a stay

Immediately upon announcing the judgment of this court, Mr Ong Chee Yong made an oral application to stay execution of this judgment. Mr Ong Chee Yong submitted that the judgment sums as quantified by the trial court had been paid to the respondent. In view of the enhancement of the quantum there was a possibility that the appellants might appeal to the Court of Appeal, so submitted Mr Ong Chee Yong. Mr S Gunasegaran vehemently objected to the oral application for a stay and it was his stand that the application was unprecedented in nature. It was rightly submitted by Mr S Gunasegaran that there was no appeal filed in regard to the judgment of this court and so the question of stay did not arise at all. It was submitted that the total quantum awarded by this court was far below the prescribed ceiling and there was thus a need to obtain leave from the Court of Appeal.

Basically what Mr Ong Chee Yong wanted was to stay execution while awaiting the hearing and determination of the appeal which the appellants might file. Obviously there was no appeal filed as yet by the appellants in regard to the judgment of this court. It is now trite law that an appeal to the Court of Appeal from the decision of this court does not operate automatically as a stay of execution. Section 73 of the Courts of Judicature Act 1964 enacts that (as amended by Act A886 with effect from 24 June 1994):

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the court below or the Court of Appeal so orders and no intermediate act or proceeding shall be invalidated except so far as the Court of Appeal may direct.

Worded and having the same effect would be r 13 of the Rules of the Court of Appeal 1994 :

> An appeal shall not operate as a stay of execution or of proceedings under the decision appealed from unless the High Court or the Court (of Appeal) so orders and no intermediate act or proceeding shall be invalidated except so far as the Court may direct.

The discretion would entirely be a judicial one whether to grant a stay of execution or not and that discretion must be exercised in accordance with established principles, having regard to all the circumstances of the case. As I said, there was no appeal filed as yet and so it was premature to entertain the oral application for a stay. The total quantum awarded to the respondent, exclusive of interest, in the present appeal came up to RM176,585. It was certainly less than RM250,000, exclusive of interest. I venture to say that even the amount or value of the subject-matter of the claim, exclusive of interest, was less than RM250,000 as can be seen from the pleadings and so there was a need to obtain the leave of the Court of

A Appeal before the appellants could proceed with their appeal (s 68(1)(a) of the Courts of Judicature Act 1964). Without hesitation, I dismissed the oral application for a stay forthwith.

Appeal dismissed.

B Reported by Jafisah Jaafar

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